Tasty Baking Company *and* Teamsters Union Local 115, a/w International Brotherhood of Teamsters, AFL-CIO. Cases 4–CA–24152, 4–CA–24611, 4–CA–24891, and 4–CA–25014

January 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 15, 1998, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a brief in reply to the answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

Contrary to our dissenting colleague, we agree with the judge, for the reasons stated by him, that Supervisor Thomas Kenny's remarks to employee Billy Martin on January 26, 1996, violated Section 8(a)(1) of the Act. The credited evidence established that at one point in their conversation Martin stated that employee Michael Flannery did not deserve the warning he had received on January 12 for leaving crumbs in the depositor because it was Martin's responsibility, and not Flannery's, to get rid of the crumbs. Kenny stated that he did not care whose job it was, "that he had told Mike that if Mike f—ked him, he would f—k Mike back." Kenny then told Martin that "if you f—k me, I'll f—k you back." Kenny ended by saying, "now, I'm getting Mike. I told him I was going to do it. Now I'm doing it."

As the judge found, Martin could reasonably conclude from Kenny's remarks, in light of Flannery's role as an open and leading union adherent, that the warning issued to Flannery on January 12 had nothing to do with his work performance but was motivated by his union activities and that his own involvement in the Union could lead to similar reprisals against himself. Under those circumstances, we adopt the judge's finding that Kenny's remarks constituted an unlawful threat.

We also agree with the judge, contrary to our dissenting colleague, that the allegation in the charge that the Respondent unlawfully demoted an "employee" is sufficient to support the complaint allegation that the Respondent unlawfully demoted a "supervisor." As the judge noted, the term "employee" in the charge was used in its generic sense and intended to reflect someone employed by the Respondent. Nothing in the Act nor in Board precedent requires a charging party to use the degree of precision in drafting a charge that the Respondent and our dissenting colleague would mandate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tasty Baking Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

"(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days of this Order, remove from its files any and all reference to the unlawful written warnings issued to Michael Flannery on January 12 and June 6, 1996, to the 3-day suspension and written warning issued to Robert Nolan in February 1996, and to the demotion and transfer to the night shift of Edwina Flannery, and within 3 days thereafter, notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way."

3. Substitute "June 13, 1995" for "August 17, 1995" in paragraph 2(e).

4. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

Although I agree with my colleagues in most respects, I do not agree with two of their findings.

The judge found, and my colleagues agree, that Supervisor Thomas Kenny, in speaking to employee Billy Martin, violated Section 8(a)(1) by his remarks about

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In affirming the judge's decision, we note that under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to establish a violation under Sec. 8(a)(3), the General Counsel must show that animus against the union activity was a motivating factor in the respondent's conduct. The respondent must then show that it would have taken the same action even in the absence of the union activity to avoid liability. Here, the credited evidence clearly establishes that the Respondent's animus against the union activities of Michael Flannery and Robert Nolan was a motivating factor in their disciplinary warnings and Nolan's suspension and in the demotion and transfer to the night shift of Michael's wife, Edwina Flannery, and that the Respondent did not meet its burden of showing that it would have taken those same actions in any event. We therefore disavow the judge's characterizing the evidence of the Respondent's actions in those incidents as either "supporting an inference" or showing that those actions "may have been motivated by" antiunion animus.

[3] We shall modify the judge's recommended Order to correct inadvertent omissions and to conform to our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

employee Michael Flannery.[1] Kenny stated to Martin that he had warned Flannery that he (Kenny) would "f—k" Flannery back if Flannery "f—ked" him. Kenny directed the same sentiment to Martin. In light of Flannery's being an open and active union adherent, the judge concluded that Kenny's remarks suggested reprisals for union activity. However, Kenny's remarks were made in response to Kenny and Martin's discussion about Flannery's being warned because crumbs were found in the Respondent's depositor. Martin opined that Flannery did not deserve the "crumb" warning and Kenny disagreed. Thus, in this context, it has not been firmly established that Kenny suggested reprisals for union activity. Rather, it is equally (if not more) plausible that Kenny was referring to Flannery's failure to insure that the depositor was clean, and that Martin would so understand the reference.

Secondly, contrary to the judge and my colleagues, I find, for procedural reasons, that the Respondent's demotion of Supervisor Edwinna Flannery (E. Flannery) did not violate the Act.[2] The complaint allegation regarding the demotion of E. Flannery was not closely related to any timely charge allegation. Thus, it is barred by Section 10(b).

In *Redd-I, Inc.,* 290 NLRB 1115 (1988), the Board set forth the factors it would consider to determine whether otherwise untimely allegations of violations of the Act are closely related to timely filed allegations so that the former are not time barred under Section 10(b). The Board examines (1) whether the untimely allegation and the timely allegation involve the same legal theory and same subsection of the Act, (2) whether they arise from the same factual circumstances, and (3) whether a respondent would raise similar defenses to both allegations. Here, applying these factors, I conclude that the allegation about E. Flannery's demotion is time barred.

The Respondent demoted E. Flannery in June 1995. An amended charge, filed October 16, 1995, alleged that Respondent violated Section 8(a)(3) by "by demoting an employee for supporting and associating with the Union." However, the first complaint, issued February 12, 1996, alleged that the Respondent violated Section 8(a)(1) by demoting E. Flannery from the position of *supervisor*.

There is a fundamental difference between an employer action directed at the union activity of an employee and employer action directed at the union activity of a supervisor. The former case is that typically before the Board, and involves Section 8(a)(3) of the Act. The focus is on the union activity of the employee and whether the employer retaliated against that employee because of his or her union activity. In the latter case, the focus is on Section 8(a)(1) and whether the employer action against a supervisor interfered with employee Section 7 rights. Employer actions against a supervisor violate the Act only in limited circumstances. In this case, the General Counsel urged that the demotion of E. Flannery was unlawful under the holding of cases like *Advertizer's Mfg. Co*., 280 NLRB 1185 (1986). That case holds that it is unlawful for an employer to take adverse action against a supervisor if that action has a "direct, severe and unmistakable thrust" that interferes with the Section 7 rights of employee relatives of the supervisor.

I now apply the elements of *Redd-I*. First, it seems clear that the theory of the General Counsel's case here is substantially different than that alleged in the charge. The General Counsel argues that the demotion of Supervisor E. Flannery violated Section 8(a)(1) because it interfered with the protected activity of her spouse. The charge, quite differently, alleged an 8(a)(3) demotion of an employee for that same employee's protected activity.

Second, the facts critical to a supervisory demotion would differ from those critical to an employee demotion. As to the former, the General Counsel must adduce evidence regarding the relationship between the employee and the supervisor. And, the General Counsel must show that the adverse action against the supervisor had a "direct, severe, and unmistakable" impact on the employee relative. By contrast, an 8(a)(3) case requires only a showing of discriminatory motive.

Finally, an employer's defenses to its actions toward a supervisor would typically differ from its defenses in regard to its actions toward an employee. Again, in regard to an allegation involving an employee discharge, an employer would defend by attempting to show it did not act in retaliation for the employee's union activity. For an allegation regarding a supervisor, the employer can show, inter alia, that its actions against a supervisor had insufficient impact on employee rights.

Overall, the differences between an 8(a)(3) "employee case" and an 8(a)(1) "supervisor case" are stark and fundamental.[3] Thus, I cannot find that a charge alleging the 8(a)(3) demotion of an employee is closely related to a complaint alleging an 8(a)(1) demotion of a supervisor.[4]

[1] As fully recounted by the judge, Michael Flannery was a leading union adherent.

[2] Edwinna Flannery is the wife of union activist Michael Flannery.

[3] My colleagues seek to minimize the fundamental difference between "employee" and "supervisor." In my view, the difference is not simply a legal distinction, but is one that would be well understood by the Charging Party Union. In any event, the General Counsel's agents, working in the Regional Office, surely knew the difference, and they could have easily suggested to the Charging Party that it may wish to amend the charge. Such an amendment would have apprised Respondent as to the essential nature of the charge. Notwithstanding all of this, the charge was never amended.

[4] For reasons set forth in my partial dissent in *Ross Stores*, 329 NLRB 573 (1999), I would not find that the untimely and timely allegations are closely related merely because they are based on acts that arise out of the same anti-union campaign.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten Michael Flannery, Billy Martin, or any other employee with discharge or unspecified reprisals because they engaged in union or other concerted protected activity.

WE WILL NOT retaliate against Edwina Flannery be demoting her from a supervisory position to a packer position and assigning her to the night shift because her husband, Michael Flannery, engaged in activities on behalf of Teamsters Local 115, a/w International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT suspend or issue a written warning to employee Robert Nolan and WE WILL NOT issue written warnings to Michael Flannery because of their activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of Act.

WE WILL**,** within 14 days from the date of the Board's Order, offer Edwina Flannery full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Edwina Flannery whole for any loss of earnings and other benefits resulting from her unlawful retaliatory demotion, and WE WILL also make Robert Nolan whole for similar losses sustained by him by virtue of the unlawful 3-day suspension imposed on him on January 31, February 1 and 2, 1996, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any and all reference to the unlawful written warnings issued to Michael Flannery on January 12, and June 6, 1996, to the 3-day suspension and written warning issued to Robert Nolan in February 1996, and to the demotion and transfer to the night shift of Edwina Flannery, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

TASTY BAKING COMPANY

Elana R. Hollo, Esq., for the General Counsel.[1]
Barry Simon, Esq., for the Respondent.
Norton H. Brainard III, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. A formal hearing in this matter was held before me in Philadelphia, Pennsylvania, between February 26 and March 5, 1997, following charges filed by Teamsters Union Local 115, a/w International Brotherhood of Teamsters, AFL–CIO (the Union) between August 17, 1995, and July 12, 1996.[2] On February 12, 1996, the Regional Director issued a complaint in Case 4–CA–24152 (G.C. Exh. 1[g]), and on November 26, 1996, issued a consolidated complaint in Cases 4–CA–24611, 4–CA–24891, and 4–CA–25014 (G.C. Exh. 1[x]). On December 10, 1996, the Regional Director issued an order consolidating both complaints for hearing (G.C. Exh. 1[cc]). The consolidated complaint alleges that Respondent, Tasty Baking Company, had in various manner violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent thereafter filed an answer to the consolidated complaint on December 6, 1996, denying the above allegations.[3]

All parties were afforded full opportunity at the hearing to appear, to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record.[4] On the

[1] Herein referred to as the General Counsel.

[2] All dates are in 1996, unless otherwise indicated. The General Counsel's and Respondent's Exhibits are identified respectively as "GC Exh." and "R. Exh." followed by the exhibit number. Record testimony is identified by the transcript (Tr.) page number. The various charges and amended charges are set forth in G.C. Exh. 1(a), (c), (e), (j), (l), (m), (r), (t), and (v).

[3] By Order dated February 13, 1997, the Regional Director granted the Charging Party Union's request for partial withdrawal of the charge in Case 4–CA–25014, and, accordingly, dismissed the corresponding allegations contained in par. 12 and part of par. 14 of the November 26, consolidated complaint relating to the removal of an employee from a training program (G.C. Exh. 1[x]).

[4] A sequestration order was put into effect on a motion by the Respondent, from which only alleged discriminatees Edwina and Michael Flannery, and Respondent's vice president for human relations, William Mahoney, were exempt. The Respondent sought to also exempt Supervisors Joe Carboy, Tom Kenny, Dave Britsch, and Joe O'Boyle, all of whom are alleged in the complaint to have engaged in unlawful conduct on behalf of the Respondent, claiming their presence was "essential" because the allegations involving them were purportedly too vague to allow the Respondent to defend itself without the supervisors being present to assist it. I denied the Respondent's request. Initially, Respondent's claim that the allegations involving these four supervisors were too vague is without merit, for the complaint clearly identifies the conduct being attributed to them, as well as date when the conduct is alleged to have occurred. Further, having selected Mahoney as its chosen representative to assist in its defense, the presence of any or all of these four supervisors was not necessary, as Mahoney or Respondent's counsel could easily have prepared the four to respond to any adverse testimony presented in their absence. In these circumstances, their exclusion from the hearing was proper under Rule 615 of the Federal Rules of Evidence, and consistent with the Board's Model

basis of the entire record in this proceeding, including my personal observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel and the Respondent,[5] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Pennsylvania corporation with an office and place of business in Philadelphia, Pennsylvania, where it is engaged in the production and distribution of snack cakes, pies, cookies, donuts, and other baked goods, and products. During the calendar year ending December 31, 1995, a representative period, the Respondent, in the course and conduct of its business operations, sold goods and products valued in excess of $50,000 directly to customers located outside the Commonwealth of Pennsylvania. The complaint alleges, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PROCEDURAL ISSUES

Respondent's Motion to Dismiss

On brief (R. Br. 25), the Respondent argues, as it did at the start of the hearing, that paragraphs 7(a)–(c), 9, and 10(b)–(e) in the November 26, consolidated complaint are procedurally deficient under the holding in *Lotus Suites v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994), and must therefore be dismissed for lack of factual specificity. I adhere to my prior ruling that *Lotus Suites* is not controlling here (Tr. 79–80).

In *Lotus Suites*, the D.C. Court of Appeals declined to enforce the Board's order which directed the employer therein to cease and desist from engaging in certain 8(a)(1) conduct, and to post a remedial order. In doing so, the court found that the Board lacked jurisdiction to issue the complaint because the latter was supported only by a general boilerplate allegation in the underlying charge that "was utterly lacking in factual specificity." Id. at 592. The court concluded that the Board's complaint in that case failed to satisfy even its own requirement as set forth in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), and *Redd-I, Inc.*, 290 NLRB 1115 (1988), that "the complaint allegation be factually related to the allegation in the underlying charge."[6]

Here, unlike in *Lotus Suites*, the complaint allegations for which the Respondent seeks dismissal are based on specific factual assertions made by the Charging Party in the charges and amended charges filed, and not on standard boilerplate language contained in the Agency's charge form. Thus, the allegations in complaint paragraphs 7(a), (b), (c), and 9 are factually similar to the unlawful conduct alleged by the Charging Party in its third amended charge in Case 4–CA–24611 (G.C. Exh. 1[v]). Likewise, the allegation in the charge filed in Case 4–CA–24891, claiming that the Respondent "treats an employee in a disparate manner with regard to the employee's terms and conditions of employment" is, I find, sufficient to support complaint allegations Section 10(b) through (e) alleging that Respondent has changed the working conditions of Michael Flannery by failing to assign him a helper, and by reducing his smoke and lunch breaks. Nor is dismissal of the complaint allegation involving the demotion of Supervisor E. Flannery warranted simply because the charge makes reference to the demotion of an employee, rather than a supervisor, for while there is no question that the Act distinguishes between the two, such knowledge can hardly be imputed to a charging party who may not be aware of such distinction or as well versed in the subtleties of labor law as an established practitioner in the field might be. I am convinced the term employee as set forth in the charge was used in its generic sense and intended to reflect someone employed by the Respondent, whether in an employee or supervisor/managerial capacity.

III. THE ALLEGATIONS

The consolidated complaint alleges that Respondent violated Section 8(a)(1) by

1. Threatening employees with unspecified reprisals because of their union activity, and telling an employee that another employee had been disciplined for engaging in union activity (pars. 7[a] and 9[i]).

2. Creating the impression that an employee's union activity was under surveillance, threatening the employee with reprisals because of such activity, and interrogating the employee regarding other employees' union sympathies (par. 7[b]).[7]

3. Threatening an employee with discharge because of his union activity (par. 7[c]).

4. Telling an employee that because of his union activity its work rules would be enforced more rigidly (par. 9[ii]).

5. Demoting Supervisor Edwina Flannery (E. Flannery) to a day-shift nonsupervisory position because her husband, Michael Flannery (M. Flannery), engaged in union activities (GC Exh. 1[g], par. 6[a]; G.C. Exh. 1[kk]).

It further alleges that Respondent violated Section 8(a)(3) and (1) by:

1. Transferring E. Flannery to a night-shift position to discourage membership in the Union (G.C. Exhs. 1[g]; 1[kk]).

2. Issuing written warnings to M. Flannery and to Robert Nolan, and by prohibiting M. Flannery from talking to a "depositor," refusing to assign him a "helper," and reducing the

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Sequestration Rule as described in *Greyhound Lines*, 319 NLRB 554 (1995).

[5] The General Counsel's unopposed motion to correct certain minor inaccuracies and typographical errors in the record is granted. The record is corrected to reflect that the proper spelling of the General Counsel's name is as set forth just below the case caption in this decision. The record is further corrected as follows: At Tr. 125, L. 6, change "Bake" to "Baking," at Tr. 161, LL. 7, 25, change "panes" to "pans," at Tr. 185, L. 9, change "beating" to "feeding," and at Tr. 458, L. 22, change "calls" to "culls."

[6] In *Redd-I*, supra, the Board established the following test for determining whether a charge adequately supports a complaint allegation: Thus, the Board will look at (1) whether the allegations involve the same legal theory as the allegations in the charge; (2) whether the allegations arise from the same factual circumstances or sequence of events as the charge. The Board may also look at whether a respondent would raise similar defenses to both allegations. Id at 928. In *Nickles Bakery*, the Board held that the *Redd-I* closely-related test also applies to 8(a)(1) complaint allegations, not just to other parts of Sec. 8(a), and that henceforth the "other acts" boilerplate language contained in a charge form would not, without more, suffice to sustain an 8(a)(1) complaint allegation.

[7] The allegations pertaining to creating the impression of surveillance and unlawful interrogations have apparently been abandoned by the General Counsel for no evidence was produced in support thereof, and the General Counsel makes no mention of them in her posthearing brief.

length of his lunch and smoke breaks, because of his union activities (par. 10 [a-g]).

IV. FACTUAL BACKGROUND

The Respondent maintains two facilities, one of which houses its bakery operations, the other its administrative offices. It has a total complement of approximately 950 employees, 700 of whom work in the production area, and approximately 50–60 falling into the managerial or supervisory category, with the number of supervisors totaling between 30 and 35. Included in Respondent's managerial hierarchy are Human Resources Vice President William Mahoney, Manufacturing Vice President Paul Woite, Production Operations Director Thomas Kenny, Manufacturing Superintendent Charles Britsch, Night Production Superintendent Joseph Carboy, and Engineering Superintendent Timothy Waldron. Below the superintendent's rank are supervisors some of whom include Bruce Maul, Joseph O'Boyle, and Daniel McCrossen.[8] The Respondent also utilizes employees in a classification known as "line" and "production" monitors in the production area. The line monitor's function is to oversee a particular production line to ensure it is operating and moving properly, and to monitor personnel working on the line, including reporting any disciplinary problems to supervisors. The floor monitors perform basically the same function except that they oversee an entire floor. Their duties include ensuring that production lines are properly supplied, rotating employees, and reassigning them in the event of a breakdown. One such monitor, Linda Casey, employed in the environmental sanitation (E&S) department, testified that her duties include reporting infractions to supervisors, and preparing writeups or memos on employees which go into their files. Such memos, according to Casey, could lead to discipline if they reflect a particular pattern of misconduct. Casey's latter testimony was corroborated by Britsch (Tr. 289, 304, 405).[9]

The Respondent's product line includes a variety of well-known baked goods such as chocolate cupcakes, crumb cakes, Krimpets, Tandy cakes, creamies, etc. The production process begins on the fifth floor where the different type batter is mixed. From there, batter is pumped or gravity-fed through pipes to stainless steel, hydraulically-operated depositors, and presumably finds it way to the ovens. The record reflects that for the most part, the production of crumb cakes occurs during the night shift, while the chocolate cupcakes are baked during the day shift. In the production of the crumb cake, the Respondent utilizes a crumb chute or hopper running from the fifth floor to the V-shaped depositor on the third floor. The depositor is operated by a depositor operator. The crumb chute, which ends right above the depositor, has a small gate that, when opened, pours crumbs into the depositor. The depositor is timed with the oven, operated by an "ovenman," to deposit the crumbs onto the batter. With the arrival of the day shift, the switch to production of chocolate cupcakes occurs, requiring that the depositor be thoroughly cleaned of all remaining crumbs and other residue.

E. Flannery and M. Flannery have each been employed by Respondent for more than 20 years. E. Flannery has held numerous positions during her long tenure with Respondent. Thus, in 1982, she was made a line monitor; in 1989 moved up to floor monitor, and in August 1990, was promoted to supervisor. In June 1995, however, E. Flannery was demoted to a nonsupervisory packer's position. Two other supervisors, William Whitehead and Whitelock, were also demoted at the same time.

M. Flannery worked as a day-shift ovenman on the third floor of Respondent's facility. As described by him, M. Flannery's duties as an ovenman included maintaining control of the heat for the ovens by turning the proper switches on and off, coordinating the oven heating times with the floor monitor and the depositor operator, and generally assuring that the baked product is properly carried away on a conveyor belt to a bin as it leaves the oven. When he arrives for work at 5:30 a.m., the production of crumb cakes is completed and the ovens are prepared for the production of chocolate cupcakes. Among the employees working in the same vicinity with him are the depositor operator, who during the relevant time period herein was Billy Martin, and the packers. The record reflects that during two 15-minute break periods and one 30-minute lunchbreak, M. Flannery relieves Martin from his depositor operator duties. During those times, however, the units are shut down, so that M. Flannery is not performing any of the depositor's duties, and is performing only his normal oven duties. M. Flannery nevertheless admits that he has on occasion run the depositor and has helped the depositor operator remove crumbs left in the depositor on completion of the crumbcake production. Regarding the cleaning of the crumb depositor, he testified that prior to January 1996, his practice was to remove leftover crumbs from the depositor when the depositor operator was not present.

The record reflects that in 1994, the Union began an organizing drive among Respondent's employees, and that M. Flannery and alleged discriminatee, Robert Nolan, a 15-year employee, figured prominently in that campaign. Both, for example, handed out authorization cards to large numbers of employees and openly distributed union literature[10] at the main entrance to Respondent's facility which conduct, according M. Flannery, was observed by various company officials including Mahoney, Kenny, Woite, and his immediate supervisor, O'Boyle (Tr. 117). Several of Respondent's managers readily admitted that Respondent was strongly opposed to the Union and knowing that M. Flannery and Nolan were actively involved in prounion activities (Tr. 337, 360, 420, 511). M. Flannery was also a member of the Union's organizing committee. He began openly distributing union literature in front of Respondent's facility in January 1995, solicited a "couple of hundred" signed union authorization cards from employees, authored various articles which appeared under his name in "*Tasty Talk,*" openly displayed his prounion sympathies by wearing a union button and hat to work, and on occasion wore a union T-shirt that was visible through the company uniform. On February 28, 1995, the Union petitioned for an election. A Board-conducted election was thereafter held on April 5, 1995,

[8] All of the named managers and supervisors are admitted by Respondent to have been supervisors within the meaning of Sec. 2(11) of the Act during 1996, the relevant time period herein.

[9] Given these facts, I find merit to the General Counsel's assertion on brief (p. 37, fn. 20) that at all relevant times herein the monitors were, if not supervisors, at a minimum agents of the Respondent within the meaning of Sec. 2(13) of the Act. See *Kidd Electric Co.*, 313 NLRB 1178, 1180 (1994). Casey's own description of her duties as monitor supports such a finding (Tr. 287).

[10] One such distribution was a union publication entitled "*Tasty Talk*" (G.C. Exh. 4).

which the Union lost. The election, however, was subsequently set aside and, on March 29, 1996, the Board directed that a new election be held.[11] Despite the Union's loss, M. Flannery continued his prounion activities.

The General Counsel contends, and the Respondent denies, that beginning with the June 1995, demotion and subsequent transfer to the night shift of E. Flannery, and continuing through June 1996, during which period the Respondent allegedly issued warnings to union activists M. Flannery and Nolan, the Respondent interfered with its employees' Section 7 rights and attempted through unlawful means to discourage further support for the Union. A discussion of these incidents follows.

A. Flannery is Demoted and Assigned to Night Shift

E. Flannery, as noted, was made a supervisor in August 1990. She remained in that position until demoted to a nonsupervisory packer position on June 13, 1995. Her testimony is that she began hearing rumors as far back as November 1994, about her possible demotion, but received assurances from managers that such was not the case.[12] On June 6, her superior, Robb, discussed her upcoming evaluation scheduled for June 24. On June 7, she discussed the rumors with Britsch, and claims Britsch told her he knew nothing about such rumors and to go and enjoy her vacation. On June 13, 1995, while on vacation, Kenny called her at home to say that some management changes had been made and that she should no be a supervisor. Kenny, according to E. Flannery, expressed his regrets about having to give her the decision over the phone, and advised that if she wished, he would be willing to discuss it with her on her return from vacation. Two other supervisors—William Whitehead and Don Whitelock—were also demoted at the same time, and a third, Nater, was terminated.[13]

On June 20, 1995, she spoke with Britsch to find out where she would be working, and learned she would be working as an "extra."[14] She again spoke with Britsch 2 days later in his office to find out why she had been demoted. Brtisch, according to E. Flannery, stated he really did not know anything about her demotion, as no one had officially told him anything, but that he assumed it was because she was "a little too intense, which tends to alienate people." E. Flannery replied that she thought this was "bullshit" and that it was because Kenny hated her husband. She told Britsch that had it been for some other reason, Respondent would not have waited for her to go on vacation to demote her, and that she had never been warned that Respondent was dissatisfied with her work. E. Flannery pointed out the fact that McCrossen had had an employee petition circulated against him and yet management supported him but would not support her. Britsch purportedly responded that she was lucky to have her job, at which point she asked and received permission to see her personnel file (Tr. 187–188). M. Flannery worked at the "extra" position until June 30, 1995, at which point the position was given to a Margaret Jefferson, who was returning from vacation.

E. Flannery claims that on July 10, 1995, she asked Kenny for an explanation for her demotion, and that he told her it was because she was not getting things done. E. Flannery, however, insisted it was because of her husband's union activity, but Kenny denied it and stated that he liked her as an employee, and that if he did not, she wouldn't have a job, that she should thank him for her job because he was responsible for her being able to keep it (Tr. 196). E. Flannery also asked about the Jefferson position, noting that it had first been offered to E. Flannery on June 22, 1995, did not become available until June 23, 1995, and given her greater seniority over Jefferson, she should have received it. Kenny responded that Jefferson had placed her name on a list for the job, but that if Jefferson was willing to relinquish it, E. Flannery could have the job. Kenny, according to E. Flannery, agreed to speak to Jefferson about the matter. Kenny further purportedly commented to E. Flannery that people were upset that she was working on the day shift, but offered no explanation when she asked how that would make people upset (Tr. 195–196).

On July 17, 1995, E. Flannery asked Respondent's CEO, Carl Watts, why Jefferson was given the job; the latter agreed to look into the matter and get back to her. E. Flannery then spoke to Paul Woite about the Jefferson position on July 21, 1995. Woite admitted there were some inconsistencies in the way a supervisor who is demoted is treated vis-a-vis her seniority, and that he was in the process of clarifying the policy because the job really should have gone to her and not to Jefferson. He also mentioned that people were upset that she was on day shift. Woite did not testify. On July 25, 1995, Watts told her that Kenny and Mahoney had decided the position properly went to Jefferson because she had put in for the position first (Tr. 197–198).

By August 1995, E. Flannery gave up all hopes of getting the Jefferson position, and around that time inquired of Britsch of the likelihood of getting a position in the Tandy Cakes area. Britsch, according to E. Flannery, told her she no longer had her seniority, that under company policy demoted supervisors lose their seniority for 3 years, after which it is regained. When E. Flannery asked to see the company policy, Britsch purportedly refused to show it to her. E. Flannery testified to another conversation with Britsch on August 10, 1995, while on her way to lunch. She claims that during this conversation Britsch told her that M. Flannery's continued distribution of union literature outside Respondent's premises "was not helping her chances of staying on day work," and that "upper management would interpret this as a slap in the face," because while they were being nice to her, her husband continued with his union

[11] Judicial notice is taken of an earlier decision issued on February 16, 1996, in Cases 4–CA–23640 and 4–CA–18565, by Administrative Law Judge Richard Beddow Jr., involving the same parties, wherein he recommended, inter alia, that the April 5, election be set aside and a new election be conducted. As no exceptions were filed to Judge Beddow's decision, his recommendations were adopted by the Board on March 29, 1996.

[12] E. Flannery testified to hearing a rumor that Kenny was stating that within 1 year she "would be feeding cake," a reference to the lowest position at the plant. She claims she discussed the matter with Mahoney who assured her she had nothing to worry about because she was Respondent's "newest rising star." Mahoney admits having a conversation with E. Flannery around November 1994, but claims she came to him in a very agitated and almost hysterical fashion, stating she was going to be fired. Mahoney advised her that these were only rumors, and that her hysterical attitude was the kind of conduct that could cause her to be fired. He then commented that she "could be a rising star" (Tr. 591). E. Flannery heard the rumor again sometime in May 1995, and this inquired of then superintendent, Robb, who told her not to be concerned because he had heard similar about her and himself too (Tr. 185–186).

[13] Nater was terminated for failing to meet his probationary period, not because of any reorganization (Tr. 558).

[14] As an "extra," E. Flannery spent 4 hours a day packing in the cupcake department, assisting another employee who only worked 4 hours per day (Tr. 194).

activity and that, because of this, she "could very seriously end up on night work (Tr. 200). Britsch, according to E. Flannery, stated he would deny ever making such remarks to her if she repeated the comments to others.

Britsch denied any prior knowledge of E. Flannery's demotion, and testified he learned after the fact that she was demoted because of "her interactions with people, the way she alienated people. She had alienated the Engineering group tremendously. It was her gruff, aggressive nature that really became her demise, along with declining performance for her product line." (Tr. 416.) He also recalls E. Flannery asking him about the Jefferson position, and claims he told her that Jefferson had seniority over her by because E. Flannery had lost her seniority when she was demoted (Tr. 417). Britsch denied making any comment to E. Flannery about her husband's distribution of union literature outside Respondent's facility, or advising that she might be able to keep her day job if M. Flannery changed his prounion behavior. He does, however, admit saying to E. Flannery that she stood a "good chance of staying on day work" if she "faded into the woodwork and not bring attention to herself all the time" (Tr. 413, 419). More importantly, he admitted that while Respondent has a policy on an employee's loss of seniority caused by a change in classification, Respondent does not always follow that policy when demoting a supervisor (Tr. 424).

In September 1995, E. Flannery was placed on the night shift. Mahoney explained that because of her reclassification, she was naturally assigned to the night shift due to her loss of seniority (Tr. 613).

Kenny's testimony as to the events leading up to the demotion of Flannery, Whitehead, and Whitelock was vague. Thus, on direct examination by Respondent's counsel, he testified that in 1994, he was promoted from maintenance superintendent to superintendent of production and asked to review the overall operation of the production department because it had not been running well, and in particular, the "Krimpet" department supervised by E. Flannery. He claims that he found that the whole production operation was "completely out of control . . . chaotic . . . and simply lacked structure" and that he told production superintendent, Fred Robb, and production manager, Bill Parshall, that "it was management's responsibility to take care of that" (Tr. 445–446).

Kenny further testified that beginning 6 to 8 months before the Union came on the scene, he held several discussions with E. Flannery regarding her need to improve the operation of the Krimpet department, which he characterized as a mess and out of control (Tr. 448–449). E. Flannery understandably denies that her department was a mess or having had any such conversations with Kenny.[15] Kenny also claims to have received repeated complaints about E. Flannery's running of the Krimpet department. Thus, he states that two monitors, Yvonne Scott and Esther Berman, came to him in tears complaining of being mistreated by E. Flannery, of her yelling and screaming, and asking Kenny to do something about her because they did not want to work under those conditions. He further testified to receiving an "onslaught" of complaints from other employees.

Asked what he might have told E. Flannery about such complaints, Kenny responded in very general terms that he cautioned her that "we had to get control a bit, how we had to shut down the area and get it straightened up and stop continually working people 8 hours a day, day in and day out, in a mess." Despite these purported numerous discussions with E. Flannery, Kenny claims she viewed his discussions with her as intrusive and made no improvements in her overall performance. Kenny thus purportedly concluded that E. Flannery just "couldn't get the job done." Although he states he discussed his views on E. Flannery with other members of management, he was unable to recall the specifics of any such meetings, or the dates, of when they might have occurred. Kenny further claims he personally observed E. Flannery's behavior and found her to be "very combative, very in-your-face. . . . Just left a mess everywhere she went when she dealt with people." (Tr. 448–451.)

Kenny testified that after he and Woite replaced Parshall and Robb (both of whom were demoted in 1994) in the production department, they reviewed all the issues in the department, including supervision, and how best to deal with them. One proposal was that E. Flannery and the other supervisors be discharged because of their poor work performance.[16] This option, according to Kenny was consistent with previous reorganizations, in particular one held in 1994, in which supervisors were discharged. He and Woite, however, agreed that terminating E. Flannery and the others was "not the way to go, " and that, at least in the case of E. Flannery, she would be demoted to a packer position. Whitelock and Whitehead likewise were demoted to hourly jobs. Kenny testified that company policy dictates that when an employee changes classifications, they loses their seniority for 3 years at the end of which their normal seniority is reinstated. Consequently, E. Flannery, as well as Whitelock and Whitehead, lost their right, at least for the next 3 years, to select their shift by virtue of having lost all seniority. Kenny stated this was the reason for E. Flannery going to the night shift. Kenny testified that E. Flannery, Whitehead, and Whitelock were treated just as all other employees affected by a change in classification have been treated.

B. Incidents Involving M. Flannery

1. The "crumbs" in depositor

On January 16, M. Flannery received a disciplinary warning for "not removing the crumbs from the crumb depositor for 2 days in a row (Wed., 1/10/96 & Thurs. 1/11/96)." (G.C. Exh. 5). M. Flannery does not deny that crumbs were left in the depositor on both days, noting that about 6 inches of crumbs were left on January 10, and a lesser amount on January 11 (Tr. 166). He testified he did not realize crumbs were left in the depositor on January 10, until notified on January 16, when the warning was given to him. The testimony of the various Respondent's witnesses who testified confirm that neither the

[15] The Union's organizational campaign got under way in early August 1994. Thus, according to Kenny, he began having these performance conversations with E. Flannery sometime between December 1993 and February 1994. E. Flannery testified that at no time prior to her demotion did Kenny ever speak to her about her management style or her overall performance (Tr. 209–210).

[16] Whitehead, according to Kenny, had problems getting people to do their job, was not authoritative, and had a tendency to let people have their way. Whitelock, Kenny testified, had similar problems in that he could not communicate with people, could not earn his employees' respect, and people simply did not want to work for him (Tr. 456–457). Kenny claims E. Flannery fell in the same category as Whitelock. Thus, in addition to the problems mentioned above, Kenny claims E. Flannery's "Krimpet" department was the poorest of all in that it was "extremely unproductive day in and day out" (Tr. 457–458).

January 10 or 11 incident was brought to M. Flannery's attention at any time prior to January 16.

M. Flannery recalled that earlier that on January 11, a "brown-out" (e.g., loss of power) occurred resulting in improper oven readings and causing him to have difficulty with the oven. He claims that Britsch and Viola came to his work area, apparently in response to the "brown-out." As to the crumbs left in the depositor that day, M. Flannery stated he assumed Martin was going to take care of the leftover crumbs. Martin, it turns out, did not do so (Tr. 120–121). M. Flannery does not dispute that he often helped Martin clean crumbs from the depositor,[17] but testified he was never told it was his responsibility to do so, and first learned it was part of his normal duties on January 16, when he received the warning. He had always assumed that the function was part of the depositor operator's normal job duties (Tr. 167–168, 179, 181).

Casey testified she learned of the January 11 incident when an employee assigned to clean out the chute and the depositor reported finding crumbs in those areas. Although she states that finding crumbs in the depositor is a common occurrence, on this particular occasion the crumbs purportedly filled the entire chute and depositor and were pouring into oven #30, the one run by M. Flannery. By her estimation, it was the worst incident she had ever seen of crumbs being left in depositor and chute (Tr. 297–298). Later that evening, according to Casey, she reported the incident to Superintendents Carboy and Britsch (Tr. 296–297, 317–318).[18]

Casey admits she did not discuss the incident with M. Flannery before reporting it to Carboy and Britsch, but offered conflicting explanations for not doing so. Thus, she at first stated that M. Flannery was still on the premises when the crumbs were found in the depositor on January 11, but when asked why she did not inform M. Flannery of the problem, responded in a vacillatory fashion, "I don't know if Mike was even in the building at that time" (Tr. 303). Yet, during further cross-examination, Casey proffered that she did not mention the incident to M. Flannery that day because he "wasn't around at the time," but when reminded about her earlier answer that she did not know whether or not M. Flannery was still on the premises, stated, unconvincingly, "Okay. I will say that Mr. Flannery wasn't on the third floor in the 30 oven area at the time of the incident" (Tr. 305). Casey's testimony as to why she did not inform M. Flannery is simply not believable and is not credited. M. Flannery in fact testified, without contradiction, that he was indeed still at the plant when the crumbs were discovered. Accordingly, I credit M. Flannery and find he was still at the worksite on January 11, when the crumbs were found in the depositor.

Britsch also testified to receiving notice of the leftover crumbs from Casey. His version, however, does not coincide with Casey's. Britsch, for example, states Casey told him that a considerable amount of crumbs had been left in the depositor and crumb chute "on two consecutive days," e.g., January 10 and 11. Casey, however, never testified to reporting two separate incidents to Britsch. Britsch's further claim that Casey was required to report the incident to him is also contrary to Casey's testimony that she reported the matter to him as a matter of courtesy (Tr. 428).

Britsch and others whom he did not identify purportedly investigated the incident and "we found out" that the crumbs were left during a changeover from crumb cake to chocolate cupcake production. He testified that because M. Flannery had relieved depositor Martin during changeovers on January 10 and 11, it became his responsibility to insure the depositor and chute were free of crumbs. Based on that "investigation," Britsch decided that M. Flannery should be issued a "performance" warning, and instructed O'Boyle to do so (Tr. 400–401). Asked if he or anyone spoke to M. Flannery regarding the January 10 incident, Britsch answered he did not because he hadn't had time to gather the information from Casey, who was on a different shift. There is no indeed no indication in the record that Britsch, during his investigation of the January 11, incident, sought to ascertain from either Martin or M. Flannery their version of what had happened on either January 10 or 11.

O'Boyle testified that on January 12, Britsch informed him of M. Flannery's alleged failure to clean out the depositor and that, pursuant to his instructions, prepared a written warning to M. Flannery for "not removing the crumbs from the crumb depositor for 2 days in a row, (Wed., 1/10/96 & Thurs. 1/11/96)."[19] The warning states it was M. Flannery's responsibility "to empty the depositor for cleaning and this was not done." O'Boyle claims that for "as long as I can remember," the oven man, not the depositor operator, was responsible for making sure no crumbs remained in the depositor during a changeover in production. O'Boyle never questioned Martin about the incidents, explaining "it was my understanding Mike [Flannery] sent Billy [Martin] away on break at the changeover; so that automatically puts the burden on Mike to make sure the crumbs" are removed (Tr. 351). He also did not discuss either incident with M. Flannery before issuing the warning.

O'Boyle admits that no employee has ever been issued a disciplinary warning for failing to clean out a depositor. He explained, however, that M. Flannery received one because he left crumbs in the depositor 2 days in a row. Had there been only one incident, no warning would issued, according to O'Boyle. Instead, the matter would have been called to M. Flannery's attention and that would have been the end of it (Tr. 324–326). O'Boyle claims that on January 16, when he gave M. Flannery the warning, the latter simply shook his head but did not deny responsibility for the incident. He admits to never mentioning the January 10, incident to M. Flannery during their discussion of the warning (Tr. 347–348).

On January 18, M. Flannery filed a written grievance under the Company's internal grievance procedure protesting the warning, asserting therein that the warning was issued because he supported the Union's effort to "unionize" the Company

[17] Although M. Flannery responded affirmatively when asked by Respondent's counsel if his removal of the crumbs was the standard practice long before January 1996, his response in this regard was, in my view, nothing more than a reaffirmation of his prior claim that he helps the depositor man, and not an admission that he understood such work to be part of his own duties as ovenman.

[18] Carboy did not testify. It should be noted that on direct examination Casey did not state she had reported the incident to Britsch. Rather, she did so on cross-examination almost as an afterthought and pursuant to a suggestive query from the Charging Party's attorney. Casey, however, explained that she reported the incident to Britsch more as a matter of courtesy, suggesting implicitly, and contrary to Britsch's contrary assertion, that she was under no obligation to do so (Tr. 305; 428).

[19] Although the "crumbs" incidents purportedly occurred January 10 and 11, the warning shows January 12, as the "Date Infraction Occurred" (G.C. Exh. 5).

(G.C. Exh. 6). He claims he met with O'Boyle that same day to discuss the grievance and that O'Boyle disputed his contention that the warning had been issued for his union activities. O'Boyle instead insisted the warning resulted from crumbs being left in the depositor, an explanation M. Flannery declined to accept. O'Boyle was not asked about this alleged subsequent conversation with M. Flannery.

M. Flannery also spoke with Britsch that same day in the latter's office. Britsch, according to M. Flannery, began the meeting by discussing the warning and by telling M. Flannery they were "were enemies over this." M. Flannery purportedly responded that he did not share Britsch's sentiments regarding their relationship. He then informed Britsch that he believed he was being set up, explaining that everyone knew that crumbs had been left in the hopper before he had left work, and if the crumbs had really been a concern, someone should have called it to his attention and he would have remedied the problem.[20] Britsch puportedly responded that the warning was part of Respondent's new "get tough" policy that was being implemented because too many people were "screwing up." M. Flannery claims that Britsch then suggested that "enemies" was probably not the right word to use to describe their relationship, and went on to say while he (M. Flannery) felt he "was doing the right thing for Tasty Baking people," he (Britsch) felt he was "doing the right thing for Tasty Bake and will do whatever I have to keep the union out." (Tr. 124–125.)

Britsch acknowledged meeting with M. Flannery to discuss the grievance, but lacked specific recollection of what was said. He does claim to have told M. Flannery that the warning had nothing to do with the Union and was instead related to poor work performance. He did not, however, recall if M. Flannery denied responsibility for the "crumbs" incident. Nor did Britsch deny outright the "enemies" remark attributed to him by M. Flannery, stating only that he "does not think that I said [to M. Flannery] that we were enemies," and instead believes he "might have alluded to the fact that, in my opinion, arguing about union affairs is the same as arguing about church or arguing about politics; that there are no winners; that people only wind up as enemies when they argue about these situations because there are no winners." On cross-examination. Britsch conceded he could not recall specifically what was said during this meeting (Tr. 410–411; 420).

Kenny was equally as vague. Thus, asked if he had any involvement in the warning issued to M. Flannery, Kenny testified that he did not know if he investigated the incident other than to simply approve it, and when queried regarding any conversations he may have had with Britsch regarding the warning, responded rather ambiguously, "Well, Mr. Britsch would quite naturally, as he was answering a grievance, tell me what he found." His suggestion that Britsch might have informed him of the warning is not confirmed by Britsch who made no claim to having discussed the matter with Kenny. Any suggestion that Kenny may have been part of Britsch's purported "investigative" team is disputed by Kenny's own admission that he did not investigate the matter.

2. The "helper" issue

M. Flannery claims he was usually assigned a helper during cupcake production, but that beginning late September or early October 1995, Respondent stopped assigning him a helper. When he inquired of baking department monitor Sam Viola as to the reason, Viola purportedly told him that Respondent was "short on people" (Tr. 116). On January 18, M. Flannery filed a grievance claiming that while two men are assigned to run the ovens on the other floors, and on his third floor during the night shift, he is the only person assigned to the third floor, day-shift oven operation, and that he believed he was being treated differently because of his support for the Union and his attempts to unionize the Company (G.C. Exh. 7). He testified that on previous occasions during crumb cake production, he had been assigned such a helper.

Viola denied receiving a complaint from M. Flannery regarding a helper, and testified that, in any event, helpers are assigned only in certain cases, such as when extra ovens are to be run and the additional help was available (Tr. 387–388).

O'Boyle responded to the grievance the same day, stating that only if the work schedule called for the operation of more than two ovens at the same time would a helper be assigned to assist M. Flannery, and that the reason a helper is assigned to the sixth floor oven man is because most of the time three ovens are in operation, but that if only two were operating, the oven man would receive no helper. O'Boyle denied M. Flannery's claim that the failure to assign him a helper was in any way related to his union activity (G.C. Exh. 7). O'Boyle testified that M. Flannery has never been denied a helper if one was needed, and that only on rare occasions was a helper needed (Tr. 335).

3. The "no talking" restriction

M. Flannery claims that on January 30, O'Boyle instructed him to remain at his job behind the ovens and not talk to Martin. According to M. Flannery, it was common practice for the depositor operator and the ovenman to speak with one another (Tr. 127). O'Boyle denied prohibiting M. Flannery from speaking with Martin, noting that the oven man and the depositor operator must communicate with each other regarding baking times and to discuss when breaks will be taken. He admits, however, that on occasion he may have had to break up discussions between the two when he observed them standing together for extended periods of time, e.g., 5–10 minutes (Tr. 333–335).

4. Kenny's April 11 remarks to E. Flannery

M. Flannery testified that shortly before 11 a.m. on April 11, as he stood behind the third floor ovens, Kenny approached him, and remarked, " I don't believe you. After what happened to your wife (e.g., the demotion), you're still pushing the union and calling OSHA. Are you going to make me fire you?" M. Flannery states he did not respond to Kenny's comments (Tr. 127–128). Kenny generally denied ever having had a conversation with M. Flannery regarding OSHA, or telling him he thought M. Flannery had called OSHA to come to Respondent's facility (Tr. 467). He was not, however, asked about, and consequently did not deny, having made reference to his wife's demotion or to his continued union activity, or having suggested that he (M. Flannery) was going to make Kenny fire him.

5. The change in smoke break/lunch policy

M. Flannery testified that when he returned to work on Monday, April 29, O'Boyle told him he was no longer permitted to take his smoke break behind the black doors separating the

[20] M. Flannery's claim to Britsch that he was still in the plant when the crumbs were discovered, presumably by Casey and the employee who reported the matter to her, undermines Casey's.

third floor baking area from the engineering shops, which M. Flannery claims he'd been doing for 24 years, and that from then on he, O'Boyle, would instruct M. Flannery when to take his breaks.[21] According to M. Flannery, O'Boyle offered no explanation for this change in his working conditions (Tr. 130).

O'Boyle agrees that he instructed M. Flannery in 1996, not to use the third floor hallway as a smoking area, but to instead use the designated smoking rooms on the second or fourth floors. However, he gave somewhat conflicting reasons for doing so, stating at first that it was part of a companywide directive aimed at all employees, but subsequently asserting that he changed the practice of employees smoking in the hallway because he did not want his employees smoking where he could not see them (Tr. 333, 344). He claims he personally informed both M. Flannery and another employee, Howard Booker, of the new smoking restriction, but did not personally inform other employees under his supervision because "the word got around that there's no more smoking in that area" (Tr. 331–333). O'Boyle further admits telling his employees, including M. Flannery, how long of a break they were entitled to, and did so because employees were overextending their breaks (Tr. 330).

6. The June 6 "oven times" incident

On June 6, M. Flannery received a second written warning for giving the mixing room employees the wrong "finish" times which presumably caused in a one-half hour loss of production time. The warning advised that a third warning would result in a 3-day suspension (G.C. Exh. 8). On June 14, M. Flannery filed a grievance protesting the warning, noting therein that although O'Boyle had stated a memo was being put in his file and he would receive a warning only if a similar incident occurred within six months, O'Boyle nevertheless issued him a performance warning. M. Flannery stated his belief that the warning was issued because of his union activity (G.C. Exh. 9). M. Flannery, O'Boyle, and Britsch gave testimony regarding this incident.

M. Flannery testified that he generally receives verbal notice of the oven times for a particular day from a floor monitor, and that he then writes down the times and provides operator Martin with a copy. He claims that on June 6, while returning from lunch, employee Terry Richardson told him about the mixup with the oven times, and when he arrived at his work station was officially told by O'Boyle. M. Flannery testified he tried to get the oven restarted so as to reduce the amount of production time lost to 5 or 10 minutes, but that baking department monitor, Sam Viola, called down from the mixing room and told him to forget it, and to run whatever was left in the system to make devil's food cake.

O'Boyle, according M. Flannery, told him he was going to write him up for the incident and later that day, on his way to take a smoke break, was told by O'Boyle that a memo of the incident had been placed in his file. However, the following day, O'Boyle called him into his office and showed him a warning that had been issued to him regarding the incident. When M. Flannery remarked, "[Y]esterday memo, today its a warning," O'Boyle responded that "the powers that be decided it should be a warning." (Tr. 131.) M. Flannery claims that the mixup in times did not result in any loss of production (Tr. 135).[22]

O'Boyle gave a different version of his conversation with M. Flannery. Thus, he testified that on June 6, M. Flannery admitted he had screwed up by giving the mixing room personnel the wrong times. After O'Boyle told M. Flannery not much could be done at that point, Britsch, who was standing nearby, told him (O'Boyle) that M. Flannery's mistake at a minimum warranted a memo be put in his file. O'Boyle purportedly agreed with Britsch's assessment and thereafter prepared a memo and gave it to Cathy Mahoney, an employee in Respondent's planning and schedule department, with instructions to put it in M. Flannery's file. However, O'Boyle claims that the matter was subsequently reviewed by upper management who decided that because of the one-half hour of lost production time, M. Flannery should receive a warning. O'Boyle denied taking part in that decision, but admits issuing the warning to M. Flannery (Tr. 326–327).

O'Boyle admits that M. Flannery receives the daily oven times from some else, e.g., from monitor Sam Viola, employee Cathy Morrissey, or himself. O'Boyle, however, was uncertain who might have given the oven times to M. Flannery on June 6, suggesting it might have been Morrissey. Despite his uncertainty as to who provided M. Flannery with the oven times, O'Boyle testified he checked the oven times Morrissey had recorded on a piece of paper with those M. Flannery had written down, and that the latter's times were wrong. He admits he did not ask Morrissey what she might have stated to M. Flannery (Tr. 343–344).

Britsch's testimony is consistent with O'Boyle's only insofar as Britsch agrees mentioning that M. Flannery's "oven time" incident warranted a memo to M. Flannery's file. However, their stories vary in other material respects. Thus, Britsch denies directing O'Boyle to place a memo in M. Flannery's file, testifying instead that, in his view, no such decision was ever made (Tr. 425). He further contradicts O'Boyle's implicit denial that he had anything to do with the issuance of the warning, stating in this regard that he, Kenny, and O'Boyle "discussed the magnitude of the situation later that day . . . and felt it justified a warning" (Tr. 403). Britsch testified that the warning was issued because it had caused the Company "30 minutes of lost time and lost sales" (Tr. 405). He could not, however, recall whether any oven man had ever been issued a warning in the past for similar conduct.

Although the Respondent claims on brief (R. Br. 24) that Kenny made the decision to issue the warning to M. Flannery after consultation with Britsch, the record does not bear this out. Thus, Kenny provided little specifics about this incident and testified only in a very general sense that when an employee receives a discipline, a supervisor presents him with the action to be taken and he either approves or disapproves it. Kenny claims he does not investigate any particular matter until the affected individual complains to him about the action taken

[21] The area previously used by M. Flannery for smoking is approximately 20 feet from E. Flannery's workstation, whereas the fourth floor smoking room where he was instructed by O'Boyle to start taking his smoke break was some 100 yards away. The previous smoke locale continues to remain a smoking area for maintenance and mechanics personnel.

[22] The Respondent objected on hearsay grounds to M. Flannery's further testimony that Howard Brocker, a third floor packer monitor, told him that the order had been made (Tr. 136). I sustained the objection. However, given my finding herein that monitors were agents of Respondent, M. Flannery's testimony as to what Brocker might have said to him would not be hearsay. *Advance Auto Parts Distribution Center*, 322 NLRB 910, 911 (1997); Fed.R.Evid. 801(d)2(D).

(Tr. 518–519). Asked about his involvement in the warning, he vaguely responded, "either that warning was recommended to me or I okayed that warning." Kenny's testimony thus makes clear he was not sure of his own involvement in the issuance of the warning. The warning, it should be noted, contains only O'Boyle's signature, and a grievance filed by M. Flannery over that warning was considered by Britsch and upheld by Manufacturing VP Paul Woite, not by Kenny (G.C. Exh. 8). Thus, other than Britsch's rather dubious testimony and Kenny's own vague assertions, I find little evidence to support Respondent's claim that Kenny was responsible for the issuance of the warning. Kenny, however, explained that he was in full agreement with the warning because as a result of the wrong oven times "there was lost time, there was lost product" (Tr. 469–470).

C. Incident Involving Nolan

On January 31, Nolan received a 3-day suspension (January 31, February 1–2), and subsequently issued a written warning on February 5, for "Insubordination" resulting from an incident that occurred on January 31, between him and Casey (G.C. Exh. 26). A description of the incident as described by Nolan and Casey follows.

Nolan testified that on January 30, Casey filled in for his then monitor Whitehead, who apparently took the day off. He claims he often worked either a 12 to 8 p.m. shift, or a 2 to 10 p.m. shift. During the latter shift, Nolan's breaks were a 15-minute break at 5 p.m., a lunchbreak at 7 p.m., and a final 15-minute break at 9 p.m. On January 30, Casey informed Nolan that his breaks that day would be at 4, 6, and 8 p.m., and that whatever he had done under Whitehead was his business.[23] The next day, January 31, at about 1:50 p.m., Nolan claims he spoke to Whitehead about the change in his breaks, and asked to be put back on a 5, 7, and 9 p.m. break schedule, and that Whitehead agreed to the change (Tr. 265). At 5:10 p.m. that day, Nolan was speaking to his wife on the phone when Casey approached and, according to Nolan, began screaming that he was not on break, that he had been told the day before that this was not his breaktime. Nolan told Casey he was speaking to his wife and then asked to see Whitehead. Casey then instructed Nolan to get off the phone and return to work, which Nolan claims he did almost immediately. Casey purportedly told Nolan that she was "writing this up." Nolan claims he went to see Whitehead soon thereafter and that the latter told him not to worry about it (Tr. 266). Nolan then returned to his job but soon thereafter, at around 5:25 p.m., Casey appeared and directed him to "punch out," which Nolan did. Nolan claims he remained calm throughout the incident, but was shocked by Casey's behavior.

Whitehead testified to having a phone and a subsequent face-to-face conversation with Nolan that day. As to the phone call, Whitehead testified Nolan called him to say Casey had caught him talking on the phone and would he agree to say that he (Nolan) was on break. Whitehead claims he refused to lie for Nolan and that "at that point, Linda [Casey] proceeded to issue out a warning and send [Nolan] home" (Tr. 359). Whitehead implicitly denied Nolan's testimony that he authorized Nolan to take his breaks at 5, 7, and 9 p.m. when he stated Nolan's breaktimes should have been at 2, 4, and 6 p.m. He did not, however, provide any information regarding his face-to-face conversation with Nolan (Tr. 364).

The following day, while at home on suspension, Nolan received a call from Daytime Supervisor Maul who told him he was being issued a warning for insubordination. The warning, signed by McCrossen, was in fact issued on February 5 (G.C. Exh. 26). On February 5, Nolan spoke with McCrossen about the warning who informed him the warning had been issued for insubordination. Nolan claims he did not file a grievance because when he asked McCrossen for a grievance form, the latter told him he should get one from Flannery, an apparent reference to the fact that M. Flannery had filed several grievances (Tr. 271).

Casey's version of the January 31, incident is that at around 5:10 p.m., as she got off the elevator on the fourth floor, she observed Nolan talking on the phone, told him he was not on break, and instructed him to get off the phone and return to his job. Nolan responded he was speaking with his wife, but Casey again reminded him he was not on break and again told him to return to work. Nolan then asked to speak with Whitehead, but Casey stated this had nothing to do with Whitehead, and again instructed him to return to work. She claims that she left the area with Nolan still on the phone, and that she contacted McCrossen and explained the incident to him. McCrossen instructed her to send Nolan home and to find Whitehead. Casey claims she found Nolan speaking with Whitehead. When she approached Nolan, he stated he was there to pick up his paycheck. Casey told Nolan he could pick up his paycheck at his job, and reminded him that she had instructed him to return to work. Nolan, according to Casey, turned around and ignored her, at which point she claims "we just sent him home" (Tr. 290–291). Casey then prepared a memo of the incident (R. Exh. 3).

Nolan claims he asked Kenny on February 10, why he was not given an opportunity to present his case before being issued a warning, and that Kenny told him, "[S]ounds like you got a bad break." Kenny, according to Nolan, then made repeated comments about M. Flannery, called him names, stated he did not understand why everybody wanted the union," and remarked that employee Martin was "a nut." Nolan testified that Kenny agreed to review his case. Kenny, however, did not get back to Nolan but instead told Whitehead, who in turn told Nolan, that the latter's break schedule was 4, 6, and 8 p.m. (Tr. 270–271).

McCrossen, who figured prominently in the suspension and warning issued to Nolan, was not called to testify. Instead, an undated handwritten memo, purportedly prepared by McCrossen regarding the January 31, incident and presumably placed in Nolan's file, was received in evidence as General Counsel's Exhibit 24. Briefly, the memo states that on January 31, McCrossen received a call from Casey reporting that she had found Nolan talking on the phone outside his normal break period, and that when she instructed him to return to work Nolan gave her "a hard time" and did not follow her instructions. McCrossen, according to the memo, then instructed Casey to tell Nolan to "hit out the time card and that he will receive a performance warning," and would be contacted by a supervisor in the E&S department instructing him when to return to work.

[23] Casey testified that on January 30, Nolan and three other employees (Joe Logue, John Tourigian, and Keith Washington) over-extended their breaks on two occasions and that she had memos prepared and put into their files (Tr. 286–287; R. Exh. 2) which she claims was to be put in each of their files. Nolan did not recall the incident but admits that Casey told them what their break periods would be that day.

Kenny gave brief testimony regarding the January 31, incident involving Nolan. Thus, he testified he was the one who recommended that Nolan be suspended for being "insubordinate to a supervisor" (Tr. 467). He claims he received the information regarding the incident directly from Casey herself. Asked to explain why he believed the suspension was justified, Kenny explained that it was because Nolan "quite frankly was in her face and telling her in so many words to mind her own business and go see somebody else, and just wouldn't listen to her, and gave her a hard time." Kenny further explained that his policy is "that if somebody gets on somebody's face and deliberately will not follow orders, that they should be suspended and it shouldn't go beyond that. It shouldn't be argumentative, them getting into anything other than that. It should be a suspension." (Tr. 468.) Casey makes no mention in her testimony of ever having spoken with Kenny about this incident. Further, Kenny was not asked about, and consequently did not refute, the February 10, "bad break" statement attributed to him by Nolan. Kenny's claim that it was he who recommended that Nolan be suspended is contrary to Casey's testimony and inconsistent with the McCrossen memo which shows that the latter, not Kenny, was the one who not only initiated, but also implemented, the 3-day suspension immediately after the incident occurred on January 31.

Finally, Mahoney claims he also played a role in the issuance of the warning to Nolan. Thus, he claims that the "production people" brought the incident to his attention and that he reviewed "the facts independently" to see if what "the production people" wanted to do was appropriate in light of Respondent's overall corporate policy. He concluded based on this independent evaluation that the facts warranted "an insubordination charge" and that such a charge brings with it "a summary warning." Mahoney testified that he conducted his investigation between January 31, when the incident occurred, and February 5, when the warning was issued, noting that the warning could not have been issued without his approval (Tr. 566–567).

D. The Kenny-Martin Meeting

On January 26, Martin went to Kenny's office after being told by O'Boyle that Kenny wanted to see him about a suggestion Martin had submitted as part of Respondent's policy of soliciting employee suggestions on workplace improvements. Martin's suggestion was that Respondent install metal detectors at Respondent's front entrance (R. Exh. 4). Martin claims that on entering Kenny's office, Kenny showed him a copy of his suggestion and asked, "What the f—k is this?" When Martin explained that he had heard some of Respondent's bosses were carrying weapons and was afraid, Kenny told him the suggestion was a stupid one, that he never should have submitted it, and that he believed M. Flannery had put him up to it. Martin denied that M. Flannery was involved in his suggestion, stating that he had been with the Company for 16 years and had, during that period, submitted many suggestions to Respondent and received thousands of dollars for such suggestions. Kenny apparently did not believe Martin for the latter claims he continued to insist that M. Flannery was somehow involved.

The conversation, according to Martin, then turned to E. Flannery, with Kenny commenting that he had saved her job when others wanted to fire her, but had regretted sticking up for her. The conversation, Martin claims, then turned back to M. Flannery with Kenny again insisting that he had something to do with Martin's suggestion. Martin continued to deny M. Flannery's involvement with the suggestion, and then commented to Kenny that M. Flannery did not deserve the warning he had received when the crumbs were found in the depositor because as far as he knew, it was his responsibility, not M. Flannery's, to get rid of the crumbs. According to Martin, Kenny stated he did not care whose job it was, "that he had told Mike that if Mike f—ked him, he would f—k Mike back." He went on to tell Martin that "if you f—k me, I'll f—k you back." The meeting apparently ended with Kenny remarking to Martin, "now, I'm getting Mike. I told him I was going to do it. Now I'm doing it." (Tr. 220–222.)

Although he recalls meeting with Martin in January, Kenny had difficulty recalling the specifics of the meeting. Thus, he recalls the meeting lasted well over an hour, but could not recall whether he asked to see Martin, or vice versa, indicating, however, that most times people will ask to see him. He claims that he considered the suggestion to be a joke and that Martin was only kidding. When he asked Martin if it was a joke, Martin answered no, that he felt his safety was being threatened. Kenny denies asking Martin if M. Flannery had put him up to it. He testified that after some discussion with Martin, it became clear to him that the suggestion was precipitated by "a rash of threats" that management had directed at employees, and in particular about an incident involving a disagreement between a Mike Gallagher and a Bob Smoygi (Tr. 436). Kenny was uncertain, however, if he mentioned this latter incident to Martin during his meeting, stating only that "I may have said . . . something to that effect."

The meeting, according to Kenny, went from one thing to another, and was more of a general conversation between the two. He had little recollection of the various topics they may have discussed, stating, "We talked about a lot of things. I don't recall." He claims that every time he's had occasion to speak with Martin, "it's always been a conversation about life, about a lot of different things, a lot of different issues." He could not recall if M. Flannery's name ever came up during that conversation, and did not specifically recall saying words to the effect that, "if somebody f—ks with me I'm going to f—k with them." His testimony in this regard was somewhat contradictory for he at first flatly denied having made any such comment to Martin (Tr. 489). Further, while claiming he did not deal in such profane terms, he conceded on cross-examination that he and Martin often used such language in their conversations and that is was possible he would have used the profanity attributed to him by Martin (Tr. 522–523).

Kenny further could not recall telling Martin that he had saved E. Flannery's job, but would not deny having made such a remark to Martin because it would have been true. He claims that during the "restructuring" which led to E. Flannery's demotion, serious consideration was given to terminating her along with the other two supervisors, but that he opposed their terminations and "saved their jobs." (Tr. 443.) Kenny states that he was bothered by talk that he was out to hurt E. Flannery because if he wanted to hurt her, he could have allowed her to be terminated, and that the demotion decision was made based on her performance. He could not recall, however, if he mentioned this to Martin during his conversation, but that if it did come up, it was not raised by him because "I didn't bring up any of those kinds of issues at any meetings with people unless they brought them up to me."

V. ANALYSIS AND FINDINGS

A. The 8(a)(1) Conduct

1. Kenny's threat to Martin

The complaint alleges at paragraph 7(a), and the General Counsel contends on brief (G.C .Br. 19), that Respondent violated Section 8(a)(1) of the Act when during his January 26 meeting with Martin to discuss the latter's metal detector suggestion, Kenny remarked that he warned M. Flannery that he would "f—k" him back if M. Flannery "f—ked" him, that he was now getting back at M. Flannery as he said he would, and by making the same threat to Martin. I find merit in this allegation.

Initially, both Kenny and Martin agree that a meeting took place sometime in January between the two to discuss the latter's suggestion for metal detectors. However, as between the two, I credit Martin's version of the meeting. Martin seemed to be testifying in an honest and truthful manner and provided a more detailed account of the meeting. Kenny, on the other hand, discussed the meeting in very general terms and was at times inconsistent in his explanations. In fact, Kenny did not deny making the remark about M. Flannery, and testified only that he could not recall having made it. Further, while initially claiming he never used profanity in dealing with employees, he conceded that he and Martin often engage in such exchanges and that he might have done so during that meeting. Finally, from a demeanor standpoint, Kenny was not a very convincing witness. Accordingly, I reject his version of the January 26 discussion with Martin. Instead, I find, as testified to by Martin, that Kenny indeed told Martin that M. Flannery had been warned not to "f—k" with him, and that he had now gotten back at M. Flannery, and would likewise retaliate against Martin if the latter also "f—ked" with him.

While Kenny did not expressly state how he had retaliated against M. Flannery, his comments followed Martin's own attempt to exculpate M. Flannery for the "crumbs" incident by asserting that it was his job, not M. Flannery's, to clean out the depositor. Thus, it is fairly apparent, and I so find, that Kenny's remark about having gotten back at M. Flannery was a reference to the January 12 warning that was issued to M. Flannery for not cleaning out the depositor. From Martin's description of the incident, it does not appear that Kenny explained to Martin how M. Flannery had "f—ked" him. Absent any such explanation, and given Kenny's refusal to accept Martin's admission of culpability for the "crumbs" incident and his statement that it did not matter whether or not M. Flannery was responsible, Martin could reasonably have concluded, particularly in light of M. Flannery's role as an open and active union adherent, that the warning issued to M. Flannery on January 12, had nothing to do with the depositor-cleaning chores, but rather was linked to M. Flannery's involvement with Union. The import of Kenny's message, therefore, would not have been lost on Martin: involvement with the Union could lead to unspecified reprisals being taken against him. As such, Kenny's remarks were coercive and violative of Section 8(a)(1) of the Act.

2. Kenny's threat to M. Flannery

Complaint paragraph 7(c) alleges, and the General Counsel on brief (p. 21) contends, that Respondent violated Section 8(a)(1) when, on April 11, Kenny threatened to fire M. Flannery because he was "still pushing the union and calling OSHA." I find merit in the allegation.

As previously discussed, except for the part relating to OSHA, M. Flannery's testimony as to what Kenny said to him on April 11, is uncontroverted. While a trier of fact need not accept uncontradicted testimony as true if it contains improbabilities or reasonable grounds exist for concluding it is false, *Medin Realty Corp.*, 307 NLRB 497, 505 (1992), I see no reason to do so here. Thus, from a demeanor standpoint, I found M. Flannery generally to be a credible witness. I am convinced he testified in an honest and straightforward manner notwithstanding any minor inconsistencies that might be found in his testimony. Further, in light of Kenny's earlier threat to Martin (see discussion above), it is not unreasonable to believe that Kenny would have threatened M. Flannery, one of Union's most ardent supporters, with discharge if he persisted in his union activities.

The Respondent contends that M. Flannery's testimony can not be credited because it was not been corroborated by any other witness (R. Br. 43). However, except for Kenny himself, M. Flannery never testified that there were others around who might have overheard Kenny make his remarks and thereby been able to corroborate M. Flannery's account. If anything, his testimony that Kenny approached him as he was standing behind the third floor ovens suggests that the two were alone when Kenny made his remarks. Kenny never claimed that others were present during this meeting, nor indeed was he ever asked to confirm or deny M. Flannery's testimony in this regard. In light of these facts, and having found M. Flannery to be a generally credible witness, I see no reason to reject his claim that Kenny threatened him with discharge on April 11, solely because it has not been corroborated by others. See, e.g., *Sam's Club v. NLRB*, 141 F.3d 653 (6th Cir. 1998), enfg. 322 NLRB 8 (1996). Finally, I find Kenny's general denial about ever having spoken to M. Flannery about OSHA insufficient to refute M. Flannery's more specific testimony that Kenny brought up his wife's demotion and threatened to fire him for continuing to "push" the Union and calling OSHA. Accordingly, I find that on April 11, Respondent, through Kenny, threatened to discharge M. Flannery if he continued advocating for the Union and that, by doing so, it violated Section 8(a)(1) of the Act, as alleged.

3. Britsch's threats to M. Flannery

Complaint paragraph 9 alleges, and the General Counsel on brief contends (p. 21), that on or about January 18, the Respondent violated Section 8(a)(1) by threatening to take unspecified reprisals against M. Flannery and to enforce its work rules more stringently because of his union activities. The Respondent argues that M. Flannery's version is simply not credible and that, in any event, nothing in the conversation that occurred between the two can be construed as amounting to a threat of unspecified reprisals or a threat to enforce work rules more rigidly against M. Flannery because of his union activities (R. Br. 46). Respondent's arguments are without merit.

M. Flannery, as found above, was a generally credible witness. His version of this meeting was fact specific, that is, he recalled the meeting occurred on the morning of the day he received the warning, that it occurred in Britsch's office, and that they discussed the reasons for the warning. He further provided an account of what he specifically said to Britsch, and what the latter said to him. Britsch, on the other hand, while admitting to having had a 10-minute conversation, recalled very little of that meeting. Further, unlike M. Flannery, he described

the meeting in very general terms, stating for example, that during the meeting he "tried to deal with the situation in a professional fashion and tried to deal strictly with the points, the issues at hand." He did not deny using the term "enemies" with M. Flannery, but *does not think* he told M. Flannery they were enemies, and could simply *have alluded* to the fact that people who argue over union matters, like people who argue over religion and politics, wind up as enemies. Finally, while claiming on direct examination that this was the extent of his conversation with M. Flannery that day, on cross-examination Britsch admitted having no specific recollection of what might have been said. Britsch could therefore have made the remarks as claimed by M. Flannery and forgot he had done so.

Thus, as between M. Flannery's more reliable and detailed account of that meeting, and Britsch's own vague and sketchy description of what occurred, I credit the former and find that Britsch in fact told M. Flannery on January 18, that the latter was his enemy, that the warning issued to him was part of Respondent's new "get tough" policy, and that he (Britsch) was doing the right thing for Respondent and would do whatever it took to keep the Union out. There remains the question of whether such remarks were coercive and violative of the Act.

Respondent, as noted, argues that even if made, Britsch's mention of a new "get tough" policy and his statement about people "screwing up" were not unlawful as the remarks contain no reference to union activity and, moreover, were not characterized as threatening by M. Flannery. Respondent's arguments are without merit. Initially, M. Flannery testified only to what Britsch said during their meeting, and was never asked to opine on what, if any, impact Britsch's words may have had on him. Thus, if M. Flannery failed to characterize Britsch's remarks as threatening it is because he was simply never asked. I note in this regard that during its cross-examination of M. Flannery, the Respondent never questioned him about this particular incident. The test, in any event, for determining whether an employer's remarks are coercive depends not on the successful effect of such coercion, but rather on whether such remarks may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. *MDI Commercial Services*, 325 NLRB 53 16 (1997); *M. K. Railway Corp.*, 319 NLRB 337, 342 (1995); *Interstate Truck Parts*, 312 NLRB 661 (1993); *Cox Fire Protection*, 308 NLRB 793 (1992). Thus, whether or not M. Flannery personally felt threatened is of no real consequence, for Britsch's remarks will be found to be coercive if they had a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Nor do I find the absence from Britsch's remarks of a specific reference to union activity to be particularly significant, for more often than not antiunion threats directed at employees by an employer intent on undermining union activity are couched in the most subtle of terms without mention of the union activity against which the threat is being directed. Clearly, if viewed in isolation, Britsch's mention to M. Flannery of a new "get tough" policy and about people "screwing up" is arguably subject to more than one interpretation, including one supportive of Respondent's position. Thus, one possible construction is that Respondent's "get tough" policy was prompted by losses caused by employees "screwing up" on the production line. But there is yet another equally plausible construction for Britsch's remarks. Britsch, for example, could very well have been suggesting that M. Flannery and other employees were "screwing up" by supporting the Union, and that Respondent was retaliating against M. Flannery by issuing him a warning under its new "get tough" policy for the "crumbs" incident. Britsch's remarks, however, cannot be viewed in isolation but must be considered in light of all surrounding circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987). Here, Britsch's reference to a new "get tough" policy and his comment about "people screwing up" occurred in the context of Britsch's reference to M. Flannery as his enemy and his assertion that he would do whatever it took to keep the Union out. In these circumstances, M. Flannery could reasonably have construed Britsch's remarks to mean that the warning issued to him was part of Britsch's admitted strategy of doing what it took to keep the Union out, and as a threat that he and other union supporters faced further reprisals under Respondent's new "get tough" policy should they persist in their union efforts. Accordingly, I find that Britsch's were indeed coercive and in violation of Section 8(a)(1) of the Act.

B. The 8(a)(3) Conduct

1. The January 12, "crumbs" warning

The complaint alleges (pars. 10[a], [f]), and the General Counsel contends on brief (G.C. Br. 36–38) that the January 12 warning issued to M. Flannery was issued not for leaving crumbs in the depositor but for his union activities. The Respondent, not surprisingly, disputes the allegation.

The analytical framework for deciding when a disciplinary action, such as the warnings issued here to M. Flannery, violate Section 8(a)(3) and (1) is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, under *Wright Line*, the General Counsel bears the initial burden of making a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the issuance of the warnings. The elements of a prima facie case are satisfied by a showing that the affected employee was engaged in union or other protected activity, that the employer knew of such activity, and that it harbored antiunion animus. Once a prima facie case is established, the burden shifts to the employer to demonstrate by a preponderance of credible evidence that it would have taken the same action against the employee even in the absence of any union or other protected conduct. However, if the employer's explanation are found to be pretextual—that is, if the reasons either did not exist or were not in fact relied on—the employer will not have satisfied its burden and the inquiry ended at that point. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The General Counsel, I find, has made a strong prima facie showing under *Wright Line*, supra, that the "crumbs" warning was in fact motivated by M. Flannery's union activities. Thus, there is no disputing M. Flannery's role as an active and open union adherent, or Respondent's knowledge of such activities. Further, the above-found threats directed at M. Flannery and Martin by Kenny and Britsch provide clear evidence of Respondent's antiunion animus. In fact, Kenny's statement to Martin on January 26, barely 2 weeks after M. Flannery was handed the "crumbs" warning, that he did not care whose job it was to remove crumbs from the depositor because he was simply getting back at M. Flannery, provides near irrefutable proof that the warning was issued in response to M. Flannery's union activities, and not for any failure by M. Flannery to perform his

job assignments. The General Counsel having established a prima facie case, the burden shifts to the Respondent to show through a preponderance of credible evidence that it would have issued the warning even if M. Flannery had not engaged in any union activities. The Respondent has not done so here.

There is scant evidence, for example, to sustain the underlying basis for the warning, that is, that it was M. Flannery's responsibility to clean crumbs from the depositor when the depositor operator was on break. Thus, the only evidence in this regard is Britsch's and O'Boyle's testimony that the removal of crumbs from the depositor during a changeover in production and in the operator's absence has always been the ovenman's, e.g., M. Flannery's, job. However, contradictions in their testimony, particularly with respect to the June 6, alleged wrong oven times" incident, call into question their overall veracity. For example, Britsch and O'Boyle, as noted, contradict each other on whether a memo was ordered put in M. Flannery's file regarding the "oven times" incident, with O'Boyle claiming Britsch ordered him to do so, and Britsch denying the same. They further contradict each other as to O'Boyle's involvement in the decision to issue M. Flannery the June 6, warning, with O'Boyle stating he was not involved, and Britsch claiming O'Boyle took part in that decision. Britsch's further claim regarding the January 12, "crumbs" warning, that Casey notified him that crumbs had been left in the depositor 2 days in a row is likewise not corroborated by Casey, who testified only that she informed him only of the January 11 incident. In light of these contradictions, as well as their questionable demeanor on the witness stand, I do not credit Britsch's O'Boyle's claim that the removal of crumbs from the depositor has always been part of M. Flannery's job duties.

Thus, I find that while M. Flannery often assisted depositor operator Martin in cleaning crumbs from the depositor, there is simply no credible evidence to suggest that he was in fact required to do so as part of his normal ovenman's duties. In this regard I note that M. Flannery testified, credibly and without contradiction, that at no time prior to being issued the warning was he ever told that removal of crumbs during the depositor operator's absence was part of his regularly assigned chores. The Respondent, I further note, did not produce a copy of the oven man's job description, which Casey admits exists (Tr. 314–315), which might have shed light on the precise nature of M. Flannery's operational duties and possibly removed any doubts on this matter, for if removing crumbs from the depositor was indeed part of an oven man's responsibility, it more likely than not would be reflected in the job description. In fact, the depositor operator's job description, introduced into evidence by the General Counsel (G.C. Exh. 14), establishes rather convincingly that the removal of crumbs from the depositor was the depositor operator's function, as Martin tried to make clear to Kenny during their January 26 conversation. It is clear to me, and I so find, that the January 12 warning issued to M. Flannery was not prompted by his failure to perform his assigned job duties, as it was not his job to clean out the crumbs from the depositor either on January 10 or 11.

There is yet another factor undermining Respondent's claim that M. Flannery was disciplined for leaving crumbs in the depositor on January 10 and 11. Britsch, as noted, claims he investigated the "crumbs" incident and based on that investigation concluded that M. Flannery had filled in for Martin during the latter's lunchbreak and during a changeover from crumbcake to chocolate cupcake, and consequently was responsible for leaving crumbs in the depositor. His inquiry, however, if indeed there was one, could only be described as superficial and perfunctory in nature, for neither Martin nor M. Flannery, the only two individuals with firsthand knowledge of the events of January 10 and 11, and who could best explain why the depositor was not cleaned on either of those days, was never questioned or asked to provide an explanation regarding those incidents. Nor did he consult with O'Boyle, M. Flannery's direct supervisor and the only other person who might have had knowledge of the incident, prior to arriving at his conclusion as to M. Flannery's culpability, for O'Boyle testified that Britsch "reported" to him that M. Flannery had left "the hopper full one day, and the next day, two days in a row" (Tr. 324).[24] Although not asked to explain how he conducted his alleged investigation or who he might have questioned, it is inconceivable that Britsch would not have inquired of M. Flannery and Martin (and indeed O'Boyle) regarding their knowledge of the incidents. In fact, had Britsch questioned Martin the latter in all likelihood would have told him, as he subsequently told Kenny on January 26, that he, not M. Flannery, was responsible for not removing the crumbs from the depositor. Respondent's failure to adequately investigate M. Flannery's alleged misconduct supports an inference that the warning issued to him on January 12, was discriminatorily motivated. *Operator Engineers Local 3*, 324 NLRB 1183 (1997); *Paper Mart*, 319 NLRB 9, 10 (1995); *Denholme & Mohr, Inc.*, 292 NLRB 61, 67 (1988). Indeed, Kenny's January 26, comment to Martin, that he did not care whose job it was to remove crumbs from the depositor and that he was simply carrying out an earlier threat to get back at M. Flannery, provides near irrefutable evidence that the warning had nothing to do with crumbs being left in the depositor.

In light of the above, I find that Respondent's explanation for issuing M. Flannery the January 12 warning—his alleged failure to remove crumbs from the depositor 2 days in a row—is nothing more than a pretext designed to mask its true motive, its opposition to his union activities. As noted, when the reason given for disciplinary action is found to be pretextual, the employer will not have met its burden under *Wright Line*. As the Respondent has not met its burden of showing that it would have issued the warning to M. Flannery even if he had not engaged in union activity, the General Counsel's prima facie case remains intact, warranting a finding, which I make here, that the warning was issued for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act.

2. M. Flannery's wrong "oven times" warning

The General Counsel contends that the June 6 warning to M. Flannery for reporting the wrong oven times was in fact issued for his union activities. Not surprisingly, the Respondent denies the same, and argues that the June 6 warning "was justified because of the impact of this error in terms of lost production on the operation of the business," and "was consistent with

[24] Surprisingly, O'Boyle claims he knew nothing of either incident until Britsch reported both incidents to him on January 11 (Tr. 347–348). While the record does not make clear if Britsch was aware of O'Boyle's lack of knowledge, he could reasonably have assumed that as M. Flannery's supervisor, O'Boyle would have known of both the January 10 and 11 incidents.

discipline that [had been] previously imposed for production errors" (R. Br. 24).[25]

For the reasons previously discussed regarding the crumbs warning, I find that the General Counsel has made a prima facie showing that the June 6 warning, like the January 12 warning, may have been motivated by antiunion considerations. There is, as noted, no disputing M. Flannery's involvement with the Union, or Respondent's knowledge of such activities, and given my above findings no doubt that Respondent harbored antiunion animus. The burden thus rests with the Respondent to show that it would have issued the warning to M. Flannery even if he had not engaged in union activity. The Respondent has failed to do so.

Before turning to the merits of Respondent's argument, certain conflicts in testimony, including M. Flannery's and O'Boyle's different versions of their discussion of the incident, must be addressed, for they ultimately impact on the legitimacy of Respondent's defense. O'Boyle and M. Flannery, as previously noted, disagree on what they said to each other and how the discussion of the incident was first broached, with O'Boyle asserting M. Flannery came to him and admitted to "screwing up" the oven times, and M. Flannery claiming O'Boyle who approached him, told him the oven times he gave the mixing room employees were wrong, and that a memo regarding the incident was being placed in his personnel file. I found M. Flannery to be the more credible of the two and, accordingly, credit his version over O'Boyle's account. From a demeanor standpoint, O'Boyle was an unconvincing witness whose testimony, in my view, seemed tailored to fit Respondent's version of events. Further, as found above, inconsistencies in the description of the June 6, events provided by O'Boyle and Britsch, render suspect O'Boyle's, as well as Britsch's, testimony. To reiterate, Britsch's claim that O'Boyle took part in the decision to issue M. Flannery a warning was denied by O'Boyle, and O'Boyle's claim that Britsch instructed him to place a memo in M. Flannery's file was denied by Britsch. On this latter point, I do not credit O'Boyle's claim that he placed a memo in M. Flannery's file, for not only was no such memo found in his file, but I find it highly unlikely O'Boyle would have acted on his own and issued the memo without first obtaining Britsch's prior approval. Britsch, as noted, denies ever directing O'Boyle to do so (Tr. 425). For all of the above reasons, I credit M. Flannery over O'Boyle and accept the former's testimony as true whenever it conflicts with that given by O'Boyle. Accordingly, I find that on June 6, O'Boyle approached and notified M. Flannery of the mixup in oven times, and further told him a memo of the incident was to be placed in his file. I also credit M. Flannery's claim that when O'Boyle subsequently informed him that a warning was to be issued, the latter told him that "the powers that be decided it should be a warning, suggesting implicitly that he had no part in that decision."

Regarding the merits of its defense, I find unpersuasive Respondent's claim that it decided to issue M. Flannery a warning, rather than simply placing a memo in his file, because his purported error of providing the wrong oven times to the mixing room resulted in a loss of production. While it did include this explanation in the warning (G.C. Exh. 8), in separate June 20 denials to M. Flannery's grievance O'Boyle and Britsch both justify the warning because the mixup in oven times had the *potential* for causing a considerable amount of lost sales (G.C. Exh. 9). Their memos thus make clear that it was the *potentia*l for, and not an *actual*, loss which purportedly led to the warning.[26] Indeed, their June 20 responses are consistent with M. Flannery's claim to be told by third floor monitor Brocker that Respondent did not sustain any loss in production and had been able to complete the order despite the wrong oven times. While Britsch and Kenny both testified that Respondent experienced a loss of production, I do not credit their testimony for not only was neither a credible witness, but their oral assertions contradict the above written responses to M. Flannery's grievance as well as M. Flannery's more credible assertion that he was told no loss was sustained by Respondent. The Respondent, it should be noted, produced no records to substantiate its claim that the wrong oven times used on June 6, had adversely affected production that day.

Further undermining the legitimacy of its defense is the fact that the Respondent, contrary to its assertion on brief, did not adequately investigate the incident before issuing the warning to M. Flannery. O'Boyle does claim that he fully investigated the matter by comparing the oven times presumably furnished to M. Flannery by "floorlady," Cathy Morrissey, to those jotted down by the former and passed on to the mixing room, from which he concluded that M. Flannery had recorded the wrong times. However, O'Boyle, whose overall credibility is highly suspect, was anything but certain regarding his investigation of this incident. Thus, he testified only that he "believed" the individual who provided the oven times to M. Flannery was Cathy Morrissey, but qualified his testimony by stating that "it's been a while ago."[27]

However, assuming, arguendo, that it was Morrissey who furnished M. Flannery with the oven times on June 6, and that O'Boyle did review the oven times recorded on a piece of paper by Morrissey, O'Boyle admits he never questioned Morrissey to determine if she might have misread the oven times to M. Flannery over the phone, and admits in this regard that such an error by Morrissey was a distinct possibility (Tr. 342–343). Further, it is not all that clear that O'Boyle actually spoke with Morrissey, for his testimony is that he "checked" the oven times purportedly recorded by Morrissey on a piece of paper with that written down by M. Flannery, and makes no mention of ever having actually spoken to Morrissey.

[25] The Respondent on brief (R. Br. 23) states that the "complaint does not allege the underlying charge and the underlying charge cannot be determined." I take its above remark to mean that this particular allegation is not related to any of the charges filed in the case. Its claim is rejected for the charge filed on June 13, 1996, in Case 4–CA–25014 makes clear reference to the warning in its statement that "[o]n or about June 6, 1996 the above-named Employer acting through its agent and/or supervisor Joe O'Boyle did discipline Michael Flannery" in violation of Sec. 8(a)(3) of the Act (G.C. Exh. 1[r]).

[26] Britsch's statement at the hearing, that the warning was issued for "30 minutes of lost time and *lost sales*" contradicts the statement in his memo to M. Flannery that the warning was issued because it had the *potential* for causing a sales loss (Tr. 405). This contradiction serves to further undermine his overall credibility.

[27] O'Boyle's "belief" that it was Morrissey who called the oven times in to M. Flannery, when viewed together with his "it's been a while ago" remark, reflects a certain degree of uncertainty on his part as to who might have provided M. Flannery with the oven times that day. Given his uncertainty, I find it difficult to accept his further testimony that he compared the oven times recorded by Morrissey on a piece of paper with that written down by M. Flannery.

Nor presumably did O'Boyle bother to obtain an explanation from M. Flannery regarding the incident before issuing the warning, for according to M. Flannery's credited account, when he was notified by O'Boyle about the mix-up in oven times, O'Boyle told him that a memo of the incident was to be placed in his file. There is no indication from either M. Flannery's, O'Boyle's, or for that matter Britsch's, testimony that M. Flannery was ever given an opportunity to explain what he knew about the mixup. If asked, M. Flannery quite possibly would have stated that he wrote down whatever he was told by the person who called in the oven times to him, presumably Morrissey.[28] That Morrissey might have provided M. Flannery with the wrong oven times would not have been so unusual, for the record reflects that just 1-month later Morrissey was involved in a similar incident during which she furnished the wrong oven times to the baking department (Tr. 392). The record, on the other hand, reveals no prior incidents by M. Flannery of providing the wrong times to another department. Thus, the likelihood that Morrissey and not M. Flannery made the mistake on June 6, is fairly strong. The Respondent, however, chose not to ask Morrissey what she may have told M. Flannery, nor for that matter to seek M. Flannery side of the story. While I seriously doubt that Respondent conducted any investigation into the matter, if it did, it was at most a superficial one. Its failure to adequately investigate M. Flannery's alleged misconduct, as found above, supports an inference that the disciplinary action taken was discriminatorily motivated.

Finally, the Respondent claims that the warning issued to M. Flannery was consistent with that issued to other employees, noting in particular, that warnings were issued in January to employees George White and Richard Brooks for errors which led to production losses (R. Exhs. 5, 6). The problem with this argument, however, is that, as found above, there is no indication that Respondent actually experienced any loss in production. Had Respondent sustained an actual loss from the mix-up in oven times on June 6, it would have mentioned the precise nature of loss in the warning, as it did with the White and Brooks. In fact, the evidence, if anything, suggests that M. Flannery was treated in a disparate manner vis-à-vis other employees who engaged in similar conduct. Thus, the record reflects that 2 weeks after the M. Flannery incident, another employee, Tom McIntyre received only a memo to file when he prematurely shut down the oven causing a loss in production time (G.C. Exh. 23).[29]

Accordingly, I find no credible support for Respondent's explanation of the June 6 warning, and am convinced that the true reason for the warning was to further punish M. Flannery for his union activity. As noted, neither O'Boyle nor Britsch, the two most connected with the issuance of the warning, were credible witnesses. The Respondent having failed to sustain its burden under *Wright Line*, I find that the warning issued to M. Flannery on June 6, was unlawful and violative of Section 8(a)(3) and (1) of the Act.

3. The warning to Nolan

Applying the *Wright Line* analysis, I find that the General Counsel has made a prima facie showing that Nolan's 3-day suspension and accompanying February 5 warning may have been motivated by antiunion reasons. As previously noted, Nolan, like M. Flannery, was an open and active union adherent, whose union sympathies were well known to Respondent. Respondent's antiunion animus is well established on this record and made evident by the unlawful threats directed at Martin and M. Flannery, and by the unlawful warnings issued to the latter for his union activities. I further find that the Respondent has not satisfied its own burden under *Wright Line* of showing that it would have suspended and issued the warning to Nolan even if he had not engaged in any union activity.

The merits of Respondent's claim that Nolan was properly disciplined for being insubordinate to Casey depends, in large measure, on which account of the January 31 phone incident can be believed, Casey's or Nolan's. Casey, as noted, avers she found Nolan speaking on the phone when he was not on a break, directed him in a normal voice to return to his work, that Nolan refused to do so and instead asked to see Whitehead, and that he was still on the phone when she left to report the incident to McCrossen. Nolan's version is that he had permission that day from Whitehead to take his 15-minute break at 5 rather than 4 p.m., that when Casey observed him on the phone she began screaming at him to get off and return to work, that he told Casey he was speaking with his wife and admittedly asked to see Whitehead, but that he got off the phone within ten seconds of being told to do so by Casey.

As between the two, I find Nolan's version to be the more credible. From a demeanor standpoint, Casey was neither impressive nor convincing. She struck me as someone who was willing to slant her testimony to help her Employer's cause. On the other hand Nolan, while by no means the perfect witness, did convince me as having testified in an honest and truthful manner. The Respondent disputes Nolan's credibility by pointing to Whitehead's testimony that soon after the phone incident with Casey, Nolan called and asked Whitehead to lie for him, and to Nolan's inability to remember that Casey on January 30, had reproached him and several other employees (e.g., Logue, Washington, Kirby, and Tourigan) for overextending their breaks.

Whitehead, as Respondent correctly points out, does claim that Nolan asked him to lie for him by saying he was on break. Nolan, however, testified that he called Whitehead and that the latter simply said not to worry about his encounter with Casey. I do not credit Whitehead, for I find it difficult to believe Nolan would have been so bold as to ask one supervisor to lie on his behalf to another supervisor. Rather, I am convinced Nolan was in fact told by Whitehead not to worry about the incident. Nor do I find significant that Nolan was unable to recall that Casey on January 30 admonished him and others against overextending their break periods, for it is not uncommon for witnesses to recall certain things but not others. Nolan did recall casy telling him and others on January 30, that their breaks for that day were at 4, 6, and 8 o'clock. Respondent's suggestion

[28] M. Flannery's testimony, as the Respondent correctly points out, reflects uncertainty as to what precisely he was told by the individual who gave him the oven times on June 6. However, M. Flannery testified that he "thought the lady told me" the correct oven time was 11:45 a.m., not 12:15 p.m. Respondent could have clarified this apparent confusion by questioning the person responsible for giving M. Flannery the oven times. It chose not to do so.

[29] Respondent sought to distinguish the McIntyre incident at the hearing. Thus, supervisor Al Grasch testified that McIntyre received a memo instead of warning because his error only caused a 7-minute delay in production. Grasch's explanation was not credible, for on cross-examination he stated that McIntyre received the memo because this was his first error of this type. As previously noted, there is no evidence that M. Flannery had had a similar incident involving wrong oven times prior to the June 6 incident.

that Nolan was lying because he did not also recall Casey's admonishment is not grounds for disbelieving his entire testimony or for finding him not to be credible. Nor, as implicitly suggested by Respondent on brief, is it proper to draw some adverse inference against the General Counsel for not calling employees Logue, Washington, Kirby, or Tourigan to refute Casey's claim that she instructed them and Nolan against extending their breaks, for these individuals were as accessible to Respondent as they were to the General Counsel, and likewise could have been called by Respondent to corroborate Casey. In sum, the arguments made by Respondent against Nolan's credibility are rejected. Rather, crediting Nolan's version of events, I find that at around 5:10 p.m. on January 31, Casey observed Nolan talking on the phone, that she then began screaming that he get off the phone and return to work, that Nolan asked to speak with Whitehead, and that he immediately got off the phone. I further credit his assertion that Whitehead told him not to worry about the incident.

On these credited facts, I find nothing in Nolan's conduct or response to Casey during the January 31 phone incident that can reasonably be characterized as insubordinate behavior. I am convinced that when Nolan asked to speak with Whitehead, he was simply trying to get Casey to confirm that he was legitimately on break. Nolan, however, never got the opportunity to explain. In fact, it was Casey's behavior throughout the entire incident that, in my view, was unreasonable and disrespectful. Had Nolan been allowed to explain, I am certain that, consistent with his testimony at the hearing, he would have told Casey that his break period had been changed by Whitehead, a claim Casey could easily have corroborated or refuted by consulting with Whitehead. Casey, however, was apparently not interested in finding out why Nolan was not at his workstation or if he maybe was on break, for she went directly to McCrossen to report Nolan's alleged insubordination without so much as inquiring of Nolan why he was on the phone, or asking Whitehead if he had authorized Nolan to use the phone or to take break at 5 p.m. When she exited McCrossen's office, the decision to suspend Nolan for three days and issue him a performance warning had been made without so much as the semblance of an investigation having been conducted by Casey or McCrossen into the matter.

Nor, given certain inconsistencies in his testimony, do I find credible Mahoney's assertion that he conducted his own independent investigation of the incident. Thus, Mahoney's claim that Casey reported the incident to him was not corroborated by Casey, whose testimony reflects only that she reported the incident to McCrossen, who in turn decided on the spot to suspend Nolan and to issue him a performance warning. Further, while Mahoney testified that no disciplinary action, such as a suspension, can be imposed without his prior review and approval (Tr. 566), there is no question that Nolan was indeed suspended before Mahoney could have given his approval, as evident again by Casey's testimony and by the memo of the incident placed in Nolan's file by McCrossen, both of which reflect the suspension as occurring soon after Casey reported the matter McCrossen. Thus, I do not accept Mahoney's claim that he was the one responsible for the suspension and warning being issued. In this regard, other than Mahoney's vague reference to the "production people," nothing in Mahoney's testimony suggests that he and McCrossen discussed the matter before the latter directed Casey to send Nolan home on January 31.

Further, even if I were to believe that Mahoney conducted an independent investigation of the incident, which I do not, the investigation was anything but adequate, for he never gave Nolan an opportunity to be heard nor did he inquire of Whitehead whether he had authorized Nolan to take his break on January 31, at 5 p.m.. In this regard I accept as true Nolan's claim that when he asked Kenny why he had not been asked to give his side of the story, Kenny told him he had gotten a bad break. Kenny never denied having had such a conversation with Nolan. Finally, I do not credit Kenny's claim that it was he who recommended that Nolan be suspended, for again his testimony that the incident was brought to his attention by Casey was not corroborated by the latter. Further, Casey's testimony makes clear that the suspension followed her discussion with McCrossen, and there is no indication that Kenny and McCrossen discussed the matter before Casey was instructed by McCrossen to tell Nolan to go home and of the issuance of a performance warning.

In sum, the numerous inconsistencies in the testimony of Respondent's witnesses regarding this incident, their questionable credibility, and the Respondent's failure to adequately investigate the matter before imposing discipline on Nolan, convince me that Respondent's claim of insubordination as the basis for the suspension and the warning meted out to Nolan is nothing more than a pretext, and that the true reason for Respondent's actions was to retaliate against him for his union activities. Accordingly, I find that the 3-day suspension and warning issued to Nolan both violated Section 8(a)(3) and (1) of the Act, as alleged.

4. The "no talking" restriction

The complaint alleges (G.C. Exh. 1[x], par. 10[b]) and the General Counsel contends that Respondent, through O'Boyle, continued to retaliate against M. Flannery for his union activities by prohibiting him from talking to Martin, a claim denied by Respondent. The sole evidence relied on by the General Counsel consists of M. Flannery's testimony that on January 30, O'Boyle told him he "was not allowed to be up on the depositor with Martin anymore" and was to remain at his job behind the oven (Tr. 127). The Respondent denies the allegation, noting that O'Boyle denies imposing any talking restriction on M. Flannery. It further points out that even if M. Flannery were to be believed, the remarks he attributes to O'Boyle on their face do not reflect a prohibition on speaking with Martin, and amounts to nothing more than a routine exercise of supervision by O'Boyle.

The Respondent has the better of the argument. Thus, the complaint alleges that Respondent "prohibited its employee Michael Flannery from talking to 'a depositor.' However, M. Flannery testified only that O'Boyle prohibited him from being at the depositor and did not state that O'Boyle also restricted him from having any conversations with Martin. Consequently, even if credited, M. Flannery's testimony does not establish that O'Boyle restricted him from speaking with Martin. Given the absence of any reference to such a prohibition in M. Flannery's testimony, and O'Boyle's denial that he ever imposed such a restriction on M. Flannery, I find no evidence to support this complaint allegation and shall accordingly recommend its dismissal.

5. The change in smoke and lunchbreaks

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act when O'Boyle prohibited M.

Flannery from taking smoke breaks in the third floor hallway and directed that he smoke only at the designated smoke rooms on the second or fourth floors. She argues that this change, resulting in M. Flannery having to walk some distance from his workstation to take a smoke break, was retaliatory in nature. The Respondent argues, in turn, that the complaint alleges only that M. Flannery's smoke break was unlawfully reduced to fifteen minutes, and contains no allegation regarding the change in smoking locations. It seeks dismissal on this ground.

I find merit in Respondent's argument, for complaint paragraph 10(e) alleges only that the Respondent unlawfully "reduced the length of M. Flannery's smoke break to 15 minutes" and does not allege that the change in smoking areas was itself unlawful. The General Counsel did not seek to amend the complaint to include this allegation or to modify paragraph 10(e) to reflect the change in location as violative of the Act, nor did she move at the conclusion of the hearing to conform the pleadings to the proof. Accordingly, the General Counsel's contention that Respondent violated the Act by changing the location where M. Flannery was permitted to smoke is found to be without merit.

The complaint further alleges at paragraph 10(d) that the Respondent unlawfully reduced M. Flannery's lunchbreak to 30 minutes. I find no merit to this allegation, for by M. Flannery's own admission he was only entitled to a 30-minute lunchbreak (Tr.160). The General Counsel, on brief (G.C. Br. 43), states that "Respondent provided no reason why M. Flannery's lunchbreaks were changed." However, she offers no explanation as to how M. Flannery's lunchbreaks may have been changed. The only evidence pointing to a possible change is M. Flannery's claim that O'Boyle told him he (O'Boyle) would decide when M. Flannery could take his breaks. The complaint, however, does not allege a violation based on O'Boyle's remarks, but rather alleges only that the violation stems from a reduction in the length of M. Flannery's lunch break, a contention which, as noted, lacks merit. Like the prior claim regarding the change in smoke locations, the General Counsel did not seek to amend the complaint to allege O'Boyle's remarks as a violation of the Act, and did not move to conform the pleadings to the proof. Accordingly, I shall recommend dismissal of complaint paragraph 10(d).

C. The 8(a)(1) and (3) Allegations Involving E. Flannery

1. Her demotion

The General Counsel contends that the Respondent demoted E. Flannery from her supervisory position to a packer position in June 1995, in retaliation for her husband's union activity, and that said demotion was violative of Section 8(a)(1), citing in support *Kenrich Petrochemicals v. NLRB*, 907 F.2d 400 (3d Cir. 1990), and the Board's holdings in *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), and *Parker-Robb Chevrolet*, 262 NLRB 404 (1982).[30] While admitting that the retaliatory discharge of a supervisor for the protected activities of a relative may be found violative of the Act under the above line of cases, the Respondent contends that "the 'demotion' a supervisor is distinguishable from a discharge," and that "[w]hen weighing the delicate balance between the rights of management to select its supervisors and the requirements of the Act, the fact that the supervisor was not discharged, but rather was demoted, should tip the scale towards finding that such a decision is not proscribed by the Act" (R. Br. 8). It further argues that E. Flannery's demotion was, in any event, part of a lawful reorganization it underwent in June 1995, that affected several supervisors, not just E. Flannery, and which was consistent with similar reorganizations in the past.

As to its first argument, there is no disputing that the demotion of a supervisor is not the same as a discharge, for unlike a demotion wherein a supervisor remains in the employer's employ albeit in a lower employee status, a discharge is more severe and results in a complete severance of the employment relationship. It is also true that the holdings in *Kenrich Petrochemicals v. NLRB* and *Advertiser's Manufacturing Co.*, supra, dealt with the discharge, and not the demotion, of supervisors. However, I find nothing in those decisions to suggest that only a retaliatory discharge of a supervisor, and not some other lesser form of retribution, is deemed proscribed by the Act. In *Parker-Robb*, the Board made clear that the underlying rationale "for finding a violation and reinstating a supervisor who would otherwise be excluded from coverage under the Act is grounded upon the view that the discharge itself severely impinged on the employees' Section 7 rights." The demotion of a supervisor in response to the union or other protected activities of a relative or other family member of the supervisor is clearly no less coercive than a discharge and, like the retaliatory discharge, would have the same unmistakable effect of interfering with the employee relative's exercise of their statutory Section 7 rights. Accordingly, I find that the demotion of a supervisor in retaliation for the protected activities of the supervisor's relatives, like a retaliatory discharge, is also proscribed by Act under the holdings of *Parker-Robb*, *Kenrich Petrochemicals v. NLRB* and *Advertiser's Manufacturing Co.*, supra.

There remains the question of whether in this particular case, E. Flannery's demotion was in retaliation for her husband's union activity or, as claimed by Respondent, part of a company reorganization. As in all cases dealing with employer motivation, the first line of inquiry is whether the General Counsel has established that protected activity was a motivating factor in Respondent's decision to demote E. Flannery. See *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), citing to *Wright Line*, 251 NLRB 1083 (1980).[31]

The General Counsel has clearly met her burden here, for not only was Respondent fully aware of M. Flannery's union involvement, it unlawfully issued him two separate warnings for his union activities and unlawfully threatened him with dis-

[30] In *Parker-Robb*, the Board addressed the question of when a supervisor's discharge violates the Act. Overruling what had come to be known as the "integral part" or "pattern of conduct" line of cases, the Board in *Parker-Robb* limited the circumstances in which a supervisory discharge would be proscribed by the Act to instances where the very act of discharge itself severely and directly impinged on the exercise of Sec. 7 rights. The instances that would trigger such a finding include the discharge of a supervisor for giving testimony adverse to an employer's interest either at an NLRB proceeding or during the processing of a grievance, for refusing to commit unfair labor practices or failing to prevent unionization of its employees, or where the discharge is in retaliation for protected or union activities engaged in by the supervisor's relative. See *Advertiser's Mfg. Co.*, supra, enfd. 823 F.2d 1086 (7th Cir. 1987), and *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), enfd. 907 F.2d 400 (3d Cir. 1990).

[31] The General Counsel's burden in a case such as this is satisfied by a showing that the Respondent knew that E. Flannery's husband, M. Flannery, was engaged in union activity, that it harbored antiunion animus, and that said animus may have been a motivating factor in Respondent's decision to demote E. Flannery.

charge, clearly demonstrating its antiunion animus. Aside from its primary defense that E. Flannery's demotion was simply part of a lawful reorganization, the Respondent argues that the timing of her demotion in June 1995, many months after M. Flannery first revealed his prounion sympathies by distributing leaflets outside its facilities in late 1994 or early 1995, militates against a finding that her demotion was related to her husband's protected activities.

While the "timing" argument may at first blush appear to favor Respondent's claim, it is worth noting that the demotion occurred only 2 months after the Board-conducted election held in April 1995, which the Respondent won. It is quite possible, therefore, that the Respondent may have been reluctant to engage in any retaliatory conduct prior to the election for fear it might be found liable for interfering with the election process, and that having prevailed in the election the Respondent no longer felt constrained to act. This might reasonably explain why Respondent chose not to act until June 1995, at which point it opted to strike back at the one individual most responsible for the Union's attempt to organize its employees, M. Flannery, by demoting his wife. When viewed in this light, the timing of E. Flannery's demotion would not undermine the General Counsel's claim that the demotion was unlawfully motivated.

Further support for the notion that the demotion was retaliatory in nature is found in Kenny's rhetorical remark to M. Flannery on April 11, which Kenny did not dispute, that he could not believe M. Flannery would continue with his prounion activities "after what happened to your wife." The clear implication of Kenny's comment is that E. Flannery had been demoted because of M. Flannery's involvement with the Union. Accordingly, I find that the General Counsel has made a prima facie showing under *Wright Line* that E. Flannery was demoted in retaliation for her husband's union activities. The burden now rests with the Respondent to demonstrate that it had a legitimate nondiscriminatory reason for the demotion.

Respondent's chief defense, as noted, is that E. Flannery was demoted as part of an internal reorganization. Initially, this alleged reorganization, according to Kenny, came about when he assumed the position of production superintendent and Woite was put in charge of the maintenance department. He claims that he and Woite selected E. Flannery, Whitehead, and Whitelock for demotion strictly on the basis of their performance. Another supervisor, Nater, who had worked for Respondent less than 90 days, was selected for termination. As to why E. Flannery was selected for demotion, Kenny explained it was because she "couldn't get the job done," stating that her department was the "poorest in the bakery" and "extremely unproductive day in and day out" (Tr. 457–458).

Of all Respondent's witnesses, I found Kenny to be the least credible. His testimony was vague and at times uncertain. Thus, asked on direct examination by Respondent's counsel if he expressed concern about E. Flannery's ability to get the job done to other members of management, Kenny replied, "I'm sure I did." But asked if he had any specific recollection of any meeting he might have attended wherein he voiced his concern, he answered, "Specifically, no" (Tr. 449). Further, while he apparently had no difficulty identifying the individuals who complained to him about E. Flannery's supervision, where those complaints were made, and the fact that two female employees came to him in tears, his memory suddenly seemed to fade when asked by the General Counsel if he could recall the year in which those complaints were made, stating at first, "I couldn't give you an exact date," then stating "it was probably in '95," and yet again suggesting, ". . . or '94, whatever." Asked again by the General Counsel if he could say within a year's time when such complaints were made, Kenny responded, "No, I have employees talk to me . . . all the time, every day, and for me to recall every conversation with every person I just couldn't do that honestly with you." I am convinced Kenny was simply being evasive in his response to the General Counsel, for on direct examination he seemed to know when these alleged complaints were made to him. Thus, asked by Respondent's counsel if "during this period of time" (e.g., 1994) any employee had complained to him about E. Flannery, Kenny emphatically responded, "Oh, absolutely, yes" (Tr. 449–450, 496–497). Further, as previously noted, Kenny vacillated regarding his meeting with Martin about the latter's suggestion for "metal detectors," at first denying emphatically that he ever used profanity with Martin, and may have done so during the meeting in question.

In light of the above, and given his generally poor deameanor on the witness stand, I do not accept Kenny's testimony that E. Flannery was chosen for demotion because of her poor work performance. Kenny's attempt to depict E. Flannery as a poor worker and supervisor is disputed by the various performance appraisals submitted into evidence which show that she consistently met or exceeded Respondent's performance standards and/or expectations for the job of Krimpet department supervisor. In her June 1994 evaluation, for example, E. Flannery received an overall performance rating of "3" out of a possible "5," and a merit increase for her performance.[32] Thus, Kenny's assertion that beginning in early 1994, he repeatedly had to speak to E. Flannery because her department was a mess and out of control, and because she was having difficulty dealing with employees under supervision, simply makes no sense in light of her 1994 performance evaluation, and is not credited.[33] Kenny placed no stock in the evaluations in deciding who to demote because he found them to be unreliable. However, given his poor performance as a witness, it is his testimony I find unreliable, not E. Flannery's performance apprais-

[32] A "3" rating is defined as: "Performance meets all or most requirements. Employee may be slightly below job requirements in a few areas, but this is offset by exceeding requirements by equal or greater amounts in other areas" (G.C. Exh. 13[f]). In her June 1994 evaluation, E. Flannery received a "3" rating in her *Technical*, *Analytical*, and *Control* skills, and a "4" rating in her *Communication* skills (G.C. Exh. 13[d]). For whatever reason, E. Flannery's 1995 evaluation was not entered into evidence. In her ability to maintain discipline, morale, and harmonious personnel relationship[s]" with employees, an area in which Kenny asserts E. Flannery was deficient, her supervisors gave her a "3" rating and wrote: "PERFORMANCE MEETS REQUIREMENT. EDWINA HAS GOOD CONTROL OVER THE PEOPLE SHE SUPERVISES. SHE IS QUICK TO INVESTIGATE AND RESOLVE PERSONNEL ISSUES AT DEPARTMENT LEVEL" (G.C. Exh. 13[d]). The only negative comment, if it be described as such, was a notation inserted in the appraisal by the appraiser's supervisor, e.g., the one who presumably reviewed the evaluation prepared by E. Flannery's own supervisor, that E. Flannery was outspoken on a number of issues. This rather ambiguous comment is not explained further. Thus, there is no suggestion that it was intended as a criticism of E. Flannery's interpersonal skills or an indication that she was having production problems.

[33] E. Flannery did testify, credibly I find, to having been told by a former supervisor, Fred Robb, in January or February 1994, that she was too demanding on the maintenance people, but that that was the extent of the conversation.

als. In short, I find no credible evidence to support Respondent's claim that E. Flannery was a poor performer or that she had difficulty getting along with her supervisors. Consequently, I am convinced poor performance was not the reason for her demotion.

There are yet other factors supporting such a conclusion. E. Flannery, for example, was not the only supervisor in her department, for she shared supervisory responsibility with Al Grasch. Yet, only E. Flannery was singled out for demotion, despite Kenny's assertion that the *entire* Krimpet department presumably was a mess and nonproductive. The Respondent offers no explanation for why only E. Flannery was demoted. Nor did it explain why if, as claimed by Kenny, E. Flannery had been performing so poorly since at least February 1994, it did not demote her during the alleged 1994 reorganization. The answer, in my view, is fairly obvious: E. Flannery was simply not the poor performer Kenny has made her out to be, as evident from her 1994 performance evaluation and, if anything, was Respondent's "newest rising star," as Mahoney assured her in November 1994.

Also undermining its defense and supporting a finding of pretext is Mahoney's suggestion that an incident that occurred 2 years prior to demotion between her and then superintendent of maintenance, James Rodgers, factored into the decision to demote her (Tr. 573).[34] While I doubt such an incident occurred, if it did take place it defies logic to believe that Respondent would wait 2 years before demoting her, in part, for that incident, particularly since she was never warned or disciplined for it and since she subsequently received her 1994 appraisal commending her for her performance. For Respondent to now suggest, through Mahoney, that this incident may have played a role in its decision to demote E. Flannery is simply too incredible to merit further discussion. Suffice it to say that the argument serves only to further establish the pretextual nature of Respondent's defense.

[34] Rodgers, E. Flannery's superior at the time of this alleged incident, testified on direct examination that at a management meeting in 1993, E. Flannery embarrassed and insulted him by asking him aloud twice during the meeting if he was asleep. Her comment, Rodgers claims, "really burned me up" and "aggravated me" (Tr. 379). On cross-examination, he admitted he was simply guessing as to when the incident occurred. Further, while stating he took personal offense to M. Flannery's comment, he admitted that there may have been some kidding around at the meeting but could not recall any specifics. Kenny claims he recalled the incident, but not when it occurred, and stated that E. Flannery yelled possibly three times to Rodgers asking if he was awake and that Rodgers did not say anything (Tr. 445). E. Flannery denied having made any such remark (Tr. 213). Neither Rodgers nor Kenny is found to be credible regarding this incident. Both had no recollection as to when the incident occurred, and were vague on the specifics of the meeting. Further, I find it inconceivable, given Rodgers' assertion that he felt very aggravated and burned up by the remarks, that he would not have insisted that E. Flannery be disciplined for her behavior towards him. In this regard, he testified only that he informed E. Flannery's supervisor, Bill Parshall, about the incident. Parshall was not called to corroborate Rodger's account nor is there any evidence that Parshall ever issued a warning to E. Flannery or, for that matter, that he ever called the matter to her attention. The failure to discipline E. Flannery for such behavior leads me to believe that either it did not occur or that, if it did, it was not viewed as offensive by Rodgers. Kenny also admitted he did not report the incident to anyone. Given these facts, I seriously doubt that any such incident occurred and am convinced Respondent concocted this incident in an attempt to further portray E. Flannery in a poor light.

The weight of the evidence thus makes clear, and I so find, that E. Flannery was performing her supervisory functions well throughout 1994, and had received no complaints regarding her performance. There is in this regard no evidence of any warnings, memos, or reprimands having been issued to her. Nor is there any evidence, other than Kenny's own discredited testimony, that E. Flannery's performance took a turn for the worst after being assured by Mahoney of her "rising star" status in November 1994. Clearly, the best evidence of any change in her work behavior would have been her 1995 performance evaluation which she apparently received in June 1995 (Tr. 186). The Respondent does not contend that no such evaluation was prepared on her. Yet, despite its obvious relevance to Respondent's defense that E. Flannery was selected for demotion because of her poor performance, the 1995 evaluation, which I am convinced exists, was not produced at the hearing or, for that matter, even discussed.

While there is therefore no way of knowing from the record just how E. Flannery fared in her 1995 evaluation, it is reasonable to infer that E. Flannery received a favorable rating, for had she not been so rated the Respondent, I am convinced, would have made that fact known at the hearing in furtherance of its defense that her demotion was prompted by her poor performance. Kenny's admission that E. Flannery's evaluations were not relied on in deciding to demote her, if anything, suggests that her 1995 evaluation could not have been unfavorable, for given Kenny's claim that E. Flannery was demoted for poor performance, his refusal to rely on E. Flannery's evaluations, including the 1995 one, could only mean that in 1995 E. Flannery, as in years past, received a favorable rating.

To summarize, Respondent's explanation for selecting E. Flannery for demotion, e.g., her poor performance, simply lacks evidentiary support and is, in my view, nothing more than a pretext designed to hide the true motive for the demotion: retaliation against M. Flannery for his union activities. I am not unmindful of the fact that two other supervisors apparently having no similar link to the Union were also demoted along with E. Flannery, and that a third was discharged. However, I remain highly skeptical that these demotions were in any way related to a reorganization Respondent underwent in June 1995, for aside from Mahoney's and Kenny's doubtful testimony, no documentary evidence was produced by Respondent establishing that such a reorganization had been planned. Mahoney sought to explain the lack of written documentation by stating that the decision to reorganize the production department was made at the highest level and called for the highest confidentiality (Tr. 571). Mahoney's testimony is simply not credible. Thus, he provided confusing testimony as to his involvement in the reorganization decision, at one point claiming that he learned about the reorganization from Kenny who simply told him, "[W]e're having a reorganization," but subsequently stating, in somewhat of a rambling fashion, that he found out about the reorganization in a general sense during staff meetings, but that the specifics he obtained from Kenny. Aside from his total lack of credibility in this regard, I find inconceivable Mahoney's claim that Respondent would hold staff meetings, discuss a major event such as a reorganization, and not put on paper or otherwise record the minutes of those meetings or the action to be taken. Further, I find no specific mention in Kenny's testimony of Mahoney being involved in the reorganization decisions. Under these circumstances, I remained unconvinced that any reorganization in fact took

convinced that any reorganization in fact took place in June 1995.

Rejection of Respondent's reorganization defense does, of course, leave unexplained its decision to demote Whitehead and Whitelock. However, it is Respondent's burden to come forward with a rational, nondiscriminatory explanation for having selected E. Flannery for demotion, a burden that, as found above, has not been met. The demotion of Whitehead and Whitelock could very well have been part of Respondent's attempt to lend an aura of legitimacy to its demotion of E. Flannery. See, e.g., *Pillsbury Chemical Co.*, 317 NLRB 261 (1995). It may also be that Respondent only intended to demote Whitehead and Whitelock in the first place, and seized the opportunity to retaliate against M. Flannery by demoting his wife. Whatever the reason, it is patently clear that Respondent's reason for selecting E. Flannery does not withstand scrutiny. Consequently, the General Counsel's prima facie case remains intact, warranting a finding that E. Flannery was selected for demotion in June 1995, in retaliation for her husband's, M. Flannery's, union activity. Accordingly, I find that the demotion violated Section 8(a)(1) of the Act, as alleged.

2. The transfer to night shift

There remains for resolution the question whether Respondent further discriminated against E. Flannery by transferring her to the night shift, as alleged in the complaint and argued by the General Counsel, or whether, as claimed by Respondent, her transfer was necessitated by company policy.

The elements of a *Wright Line* prima facie case have been satisfied here by the General Counsel. As found above, E. Flannery was demoted in retaliation for her husband's union activities, conduct he continued to engage in despite the discriminatory treatment accorded his wife for his activities. On August 10, the Respondent made known its opposition to M. Flannery's continued involvement with the Union when Britsch, according to E. Flannery, advised that her chances of staying on the day shift were being hurt by her husband's continuing conduct of distributing leaflets outside Respondent's property, and that Respondent viewed her husband's behavior as a "slap in the face." Britsch further warned that because of her husband's activities, E. Flannery could very well end up on night work (Tr. 200). E. Flannery, however, responded that her husband was a grown man and that she could not tell him what to do. Britsch recalled only that he advised E. Flannery as a "Dutch uncle" to "fade into the woodwork" if she wanted to avoid night work (Tr. 419). I credit E. Flannery's version and find that he in fact made the remarks attributed to him by E. Flannery. Britsch, as noted, was not a credible witness, and his attempt to portray himself as a friend and counselor to E. Flannery simply lacked the ring of truth.

The record does not reflect if E. Flannery told her husband about Britsch's admonition. Nevertheless, it is patently clear that M. Flannery was not to be deterred from supporting the Union, for on September 13, he again stood outside Respondent's premises in plain view distributing union literature. E. Flannery's transfer to the night shift occurred just one week later. Britsch's above comments to E. Flannery, and the timing of the transfer one week after her husband's activity, provide strong evidence that Respondent's transfer of E. Flannery to the night shift may have been motivated by her husband's refusal to cease his prounion activities, thereby establishing a prima facie case of discrimination under *Wright Line*. The Respondent's burden now is to show that E. Flannery's transfer to night shift was motivated by a legitimate nondiscriminatory reason unrelated to her husband's union activities. The Respondent, I find, has not done so here.

Respondent defends E. Flannery's transfer to the night shift by arguing that when demoted to a packer position, E. Flannery lost her seniority for a 3-year period pursuant to an established company policy, and that her loss of seniority rendered her eligible only for the night shift. I find Respondent's argument unpersuasive.

Initially, the record reflects that E. Flannery's demotion was within her own department, that is, she went from a supervisor in the baking department to a night shift packer in the same department. Regarding Respondent's policy on the loss of seniority, the only documentary evidence produced at the hearing is a provision found in section 4.6.1 of its policy-procedure manual which states:

> When an employee is transferred from one department to another, he shall retain his plant wide seniority for benefit purposes, but his occupational department seniority shall date from the time of transfer. [G.C. Exh. 27.]

On its face, however, the above provision could not have applied to E. Flannery because her demotion did not result in a transfer to another department (see Mahoney testimony at Tr. 614). Thus, there is nothing in that provision to suggest that the demotion of a supervisor, or for that matter, a nonsupervisory employee, within the same department would trigger a loss of seniority. Further, neither Britsch nor Kenny were quite sure what to make of the above provision. Britsch, for example, was not certain if Respondent had a written policy regarding the loss of seniority following a demotion, and claimed that "it has always been a policy that when you change classifications, you lose your seniority." When shown General Counsel's Exhibit 27, Britsch proffered that section "4.6.1 *more or less* deals with the situation at hand."[35] He admitted, however, that nowhere in section 4.6.1 does it state that "when someone is demoted from a supervisory position to a nonsupervisory position they will lose their seniority for a period of three years" (Tr. 423). Kenny's testimony contains a similar admission (Tr. 502). Further, both Kenny and Britsch claim that the loss of seniority occurs when a change in *classification* takes place. Section 4.6.1, however, makes no reference to classification, and states only that the loss of seniority occurs when a change in *department*, not job classification, takes place.[36]

Thus, except for section 4.6.1, no evidence of a written policy applicable to demotions of employees was produced by Respondent. More importantly, even assuming, arguendo, that Respondent had a such a policy, which I find it does not, such a policy, by Britsch's own admission, was not strictly followed. Thus, had E. Flannery "blended into the woodwork" she could have, as advised by Britsch, avoided the night shift (Tr. 424).

Overall, I find no credible evidence to support Respondent's argument that it acted pursuant to a company policy when it

[35] Britsch also explained that prior to becoming superintendent of production in 1995, the "loss of seniority" policy from a change in "classification" was not being followed by all departments, and that it became more of an across-the-board policy after his promotion.

[36] There is an obvious difference between a change in job classification and a change in department. An employee, for example, may have a change in job classification but still remain within the same department.

assigned E. Flannery to the night shift in September 1995. As the reason proffered by Respondent for transferring E. Flannery to the night shift is obviously false, I find that it has not rebutted the General Counsel's prima facie case. As such, I further find that by transferring E. Flannery to the night shift, the Respondent violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent, Tasty Baking Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union No. 115, a/w International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employee Martin on January 26, 1996, with unspecified reprisals if he should engage in union activity, telling M. Flannery that it was imposing a new get tough policy in response to his union activities and that he was issued the January 12 warning for such activities, and by threatening M. Flannery on April 11, 1996, with discharge because of his union activities and for calling OSHA, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), and Section 2(6) and (7) of the Act.

4. By demoting E. Flannery from supervisor to a nonsupervisory packer position in retaliation for her husband's union activities, the Respondent has violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

5. By transferring E. Flannery to the night shift because of her husband's continued union activity, issuing written warnings to M. Flannery on January 12, and June 6, and issuing a 3-day suspension and written warning to employee Robert Nolan in February 1996, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

6. Except as found herein, the Respondent has not engaged in any other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully demoted E. Flannery from her supervisory position, I shall recommend that Respondent be required, within 14 days from the date of this Order, to reinstate her to her former supervisory position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges she previously enjoyed, and to make her whole for any losses she may have suffered because of the retaliation practiced against her for her husband's union activities, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such amounts to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to make employee Robert Nolan whole for any loss of earnings resulting from the 3-day suspension issued to him on January 31, February 1 and 2, because of his union activities, in accordance with *F. W. Woolworth*, supra, and with interest as set forth in *New Horizons for the Retarded*, supra.

Further, to the extent it has not done so, the Respondent shall be ordered to remove from its files any all reference to the unlawful warning issued to Nolan on February 5, 1996, and to those issued to M. Flannery on January 12, and June 6, 1996, and to notify them in writing that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

ORDER

The Respondent, Tasty Baking Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Retaliating against Edwina Flannery by demoting her from a supervisory position and transferring her to the night shift because of the activities engaged in by her husband, Michael Flannery, on behalf of the Union, Teamsters Local Union No. 115, a/w International Brotherhood of Teamsters, AFL–CIO.

(b) Suspending employee Robert Nolan and issuing to him and to Michael Flannery written warnings because of their activities on behalf of the Union.

(c) Interfering with employees' rights to engage in protected concerted activity by threatening Michael Flannery and employee Billy Martin with discharge or other unspecified reprisals for supporting the Union.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Edwina Flannery full reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make Edwina Flannery whole for any loss of earnings and benefits she may have suffered as a result of the retaliatory discrimination practiced against her for the union activities of her husband, Michael Flannery, and make Robert Nolan whole for any losses he may have suffered due to the unlawful three-day suspension imposed upon him for his union activities, in the manner described in the remedy portion of this decision.

(c) Within 14 days of this Order, remove from its files any and all reference to the unlawful written warnings issued to Michael Flannery on January 12, and June 6, 1996, and to Robert Nolan on January 26, 1996, and within 3 days thereafter notify them in writing that this has been done and that said warnings will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms pro-

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

vided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."